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APPEALS PROCESS USED BY THE FOREST SERVICE, USDA

HEARING

BEFORE THE

SUBCOMMITTEE ON
CONSERVATION AND FORESTRY

OF THE

COMMITTEE ON AGRICULTURE,
NUTRITION, AND FORESTRY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE APPEALS PROCESS USED BY THE FOREST SERVICE

MAY 18, 1989

Printed for the use of the
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CONTENTS

Page

Hearing held on: May 18, 1989 1

APPEALS PROCESS USED BY THE FOREST SERVICE, USDA

Fowler, Hon. Wyche, Jr., a U.S. Senator from Georgia 1
Baucus, Hon. Max, a U.S. Senator from Montana 2
Bond, Hon. Christopher S. "Kit", a U.S. Senator from Missouri 4

CHRONOLOGICAL LIST OF WITNESSES

Burns, Hon. Conrad, a U.S. Senator from Montana 5
Harman, John W., Director, Resources, Community, and Economic Development Division, U.S. General Accounting Office, Washington, DC; accompanied by Chester Joy 8
  Prepared statement 55
  Table 1—Appealed and Litigated Fiscal Year 1988 Timber Sales in Region 1 58
  Table 2—Delayed Fiscal Year 1988 Timber Sales in Selected Region 1 National Forests 59
  Table 3—Reasons for Delays of Region 1 Fiscal Year 1988 Appealed and Litigated Timber Sales 59
  Table 4—Region 1 Shortfall From Fiscal 1988 Preparation Target 59
  Table 5—Harvesting Compared to Purchases of Region 1 Timber, Fiscal Years 1984-1988 59
Leonard, George M., Associate Chief, U.S. Forest Service, Washington, DC; accompanied by Bob Schrenk 23
  Response in relation to the reduction in timber volume on the Beaverhead and Gallatin National Forests 23
  Prepared statement 60
  Appeal of Decisions Concerning the National Forest System; Final Rule, 36 CFR Parts 211, 217, 228, 251 and 292 62
  Appeal of Decisions Concerning the National Forest System; Final Rule, 36 CFR Parts 217 and 251 92
  Appeal of Decisions Concerning the National Forest System; Interim Rule with request for comments, 36 CFR Parts 217 and 251 100
  Northern Region's Forest Plan Implementation Strategy 105
  NEPA Status 149
  Strategies 155
Riley, James S., executive vice president, Intermountain Forest Industry Association, Idaho Forest Industry Council, Coeur D'Alene, ID; accompanied by Mark E. Rey 30
  Prepared statement 174
  Forest Service Timber Program Montana, graph 176
  R-1 Timber Sale Appeals, graph 177
  Summary of Region One ASQ Accomplishment 178
  Heissenbuttel, Anne E., letter of, dated June 2, 1989, to the Honorable Wyche Fowler 179
  Critique of the New Rules for Appeal of Forest Service Decisions, 36 CFR § 217 179
  Cullen, Barry M., letter, with enclosures, dated July 15, 1988, to F. Dale Robertson 181
  Comments of the National Forest Products Association on the Proposed Rules for Appeal of Decisions Concerning the National Forest System 184
  Proposed Forest Service Appeal Regulations 213

Page

Riley, James S., executive vice president, Intermountain Forest Industry Association, Idaho Forest Industry Council, Coeur D'Alene, ID; accompanied by Mark E. Rey—Continued
  Rey, Mark E., letter of, with attachment, dated September 8, 1987, to F. Dale Robertson 262
  Comments of the National Forest Products Association on the U.S. Forest Service regulations governing administrative appeals 264
  Delaney, Anne E., letter of, with attachment, dated May 25, 1988, to Public Timber Council 286
  Appeal of Decisions Concerning the National Forest System, Proposed Rule, 36 CFR Parts 211, 217, 228, and 251 288
Colter, Anthony, senior resource manager, Louisiana Pacific Corporation, Deer Lodge, MT 34
  Prepared statement 317
Anderson, H. Michael, forest planning specialist, the Wilderness Society, Washington, DC; accompanied by Jay Watson 43
  Prepared statement 319
  Critique of the Southwest Montana Mill Crisis 321
  Attachment A 324
  Attachment B 325
Schoonen, Tony E., Montana Wildlife Federation, Bozeman, MT 45
  Prepared statement 326
  Missoulian editorial, "Some mills won't make it" 329
  Settlement Agreement Between the Deerlodge National Forest and the National Wildlife Federation, et al. and the Intermountain Forest Industry Association et al 331
  Appendix 1 344
  Appendix 2 348
  Appendix 3 356
  Appendix 4 360
  Appendix 5 361
  Dunlop, George S., letter of, dated April 28, 1988, to F. Dale Robertson, Chief, Forest Service 363

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Wolf, Robert E., Forester, St. Leonard, MD, prepared statement 365
Alley, Don, Northwest Montana Chapter of Trout Unlimited, Kalispell, MT, prepared statement 368

APPEALS PROCESS USED BY THE FOREST SERVICE, USDA

THURSDAY, MAY 18, 1989

U.S. Senate,
Subcommittee on Conservation and Forestry of the
Committee on Agriculture, Nutrition, and Forestry,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:30 p.m., in room SR-332, Russell Senate Office Building, Honorable Wyche Fowler, Jr. (chairman of the subcommittee) presiding.

Present or submitting a statement: Senators Fowler, Baucus, Bond, and Gorton.

Also present: Senator Conrad Burns.

STATEMENT OF HON. WYCHE FOWLER, JR., A U.S. SENATOR FROM GEORGIA

Senator Fowler. Ladies and gentlemen, this is the hearing on the appeals process used by the Forest Service by the Subcommittee on Conservation and Forestry.

The administrative appeals process is one of our necessary tools for public oversight of agency decisions. And of course there is continuing interest about how well this process is working in relation to the Forest Service project planning.

The controversy is apparent in the volume of cases the system is being asked to handle. The number of appeals filed on agency decisions in 1988 is three times greater than the number filed in the 1985 fiscal year. This increase has accompanied a growing concern on all sides as to whether the process serves its intended purpose.

Because of these concerns, the Forest Service adopted new appeals regulations, extensively reviewed by this subcommittee, which went into effect in January of this year, I believe.

Today's hearing reflects our continuing responsibility for congressional oversight of the implementation of the national forest land and resource management plans to ensure that the intent of the National Forest Management Act of 1976 is met.

I think there are a number of prerequisites we must all agree on in order to have a balanced, workable system for shaping our priorities in the use of forest resources. On the one hand we want all the energies of the Forest Service to go into sound planning and management of our forest resources that is in the best overall national interest, of course. But this will not happen if the agency remains constantly tied up in litigation contests over one out of every five decisions it makes.

This level of controversy may reflect, and probably does reflect, on the appeals process. But it may reflect, on the other hand, on Forest Service management decisions especially where old-growth forests are concerned.

I think we can also safely state that the openness of the appeals process to every interested party is absolutely vital. While we want to avoid unnecessary impediments to Forest Service management activities, the solution to such problems cannot come at the expense of public participation and interest in good forest planning and management.

Above all, we must have a system of administrative appeals that resolves the controversies put before it and does not merely shift the hard questions to another level of our Government.

Our job is to maintain both the accountability and the credibility of the forest planning process. This does require ongoing scrutiny and additional oversight hearings to maintain this kind of balance.

However we revise the administrative appeals system, we will not change the fact that competition for the allocation of forest resources has never been greater. As the open spaces available to our citizens steadily diminish, this competition for our forest among sportsmen, timber interests, environmentalists, Native Americans, private citizens, all of us, will intensify. That means we are going to have to handle the whole planning and appeals process better than ever.

In that light, we as the subcommittee look forward to hearing today's testimony from many diverse interests on how the new appeals process is working and what suggestions that you will have on how we might improve it.

I am pleased that Senator Baucus from Montana, a new member of the committee, has joined us, joined this subcommittee. And I will ask him to chair this hearing today, as I have been called by the higher authorities to chair some appropriations subcommittee at the same time right under us.

Thank you, Senator Baucus, for doing this. I turn it over to you.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA

Senator **Baucus**. Thank you, Mr. Chairman. I appreciate your willingness to hold this hearing. To some, Mr. Chairman, the Forest Service appeals system may seem like an esoteric subject. But to Montanans it is becoming more and more of a basic, fundamental, gut issue. That is because the appeals system symbolizes a controversy that is setting neighbor against neighbor, father against son, Montanan against Montanan. It is a controversy about the management of our public lands.

We depend on these lands for timber. To keep the mills operating. Jobs—for loggers, mill workers, and maintain timber-dependent communities from Eureka to Dillon, Montana. We also depend upon these lands for recreation. This, too, means jobs—for merchants, innkeepers, outfitters, guides, and many others.

And these vast lands help to define our character as Montanans, making our way in America's "Last Best Place." So what is going on?

The number of appeals more than doubled in Montana—that is, in region 1—between 1981 and 1988. Court decisions have imposed increasingly tighter environmental standards on the Forest Service, while the Service's budget and personnel have been cut. And the industry has liquidated much of its backlog inventory of sales.

We can see the results in the Yaak, the Gallatin, the Beaverhead, and the Flathead. There is no slack left in the system. As a result—appeals, and stays or injunctions—can lead to a timber supply shortage. And that means that hard-working folks are forced off the green chain and onto the unemployment line.

We can't put our heads in the sand. There is a problem. But we also can't react blindly. Some would put the Forest Service above the law, by broadly precluding appeals of all forest plans. That would strip Montana citizens of their rights. It would override important environmental laws. And it wouldn't really solve the problem. So, what will?

First, we need to encourage negotiations. By-and-large, we are dealing with honest disputes among Montanans. They should be settled at the bargaining table, not in the Ninth Circuit Court of Appeals courtroom in California.

Second, we need to give the Forest Service the resources it needs to do the job. And we have to hold them to it.

Third, we need a Montana roadless lands bill. Release language will eliminate many appeals. And enactment of a wilderness bill will generate more cooperation.

Fourth, we need to consider further reforms of the appeals system itself, to see if we can streamline the system while retaining a citizen's right to, in good faith, challenge Forest Service management decisions.

I hope to explore these solutions at today's hearing. And I hope that all the witnesses, and all Montanans, will work together to help solve this problem. We really don't have any other choice. As our State enters its second century, the economy remains depressed. We must, therefore, work together to find new, creative ways to generate jobs, for ourselves and our children.

But this endless wilderness warfare is bleeding us dry. Lincoln once said that a nation divided cannot stand. A community divided against itself cannot prosper.

There *are* positive signs. We have settled the Deer Lodge plan. And last weekend, I asked conservationists, industry representatives, and others to sit down and discuss the Flathead dispute. Both sides cooperated. We made real progress. We will be bringing a mediator in, and we will try to move ahead very quickly.

I hope the same spirit of cooperation will extend to today's hearing. We need to settle our differences, and move on.

I look forward to this testimony we are going to receive today, Mr. Chairman, I have had a chance to review at least the GAO's report, and I think it goes a long way to clearing away a lot of the rhetoric that has been surrounding this problem and it goes a long way to putting out more facts to help us get a more concrete solution.

I thank you again, Mr. Chairman, for holding this hearing.

Senator FOWLER. We are joined by the Senator from Missouri, Mr. Bond, whom I will now call on.

And let me say before he takes over, to Mr. Harman, Mr. Leonard, and all of our witnesses today, you do have my apologies for being necessarily absent.

Senator Bond.

STATEMENT OF HON. CHRISTOPHER S. "KIT" BOND, A U.S. SENATOR FROM MISSOURI

Senator BOND. Thank you very much, Mr. Chairman.

This afternoon's hearing, of course, is a very important one in that it will provide an opportunity to discuss an issue of growing concern: the effectiveness of the Forest Service's appeals process. Although this obviously is not an issue that is constantly in the news, the decisions made in the appeals process can affect millions of Americans throughout the country. While we must maintain the rights of individuals to express their thoughts on the management of our national forests, we must also recognize that these lands can be managed in a way which provides both ecological and economic benefits.

It should come as no surprise that there are times when Forest Service decisions are met with a high degree of minimal enthusiasm. To address this, the U.S. Forest Service has established an appeals process through which individuals and organizations can question forest officer decisions.

It is my understanding that the original intent was to resolve matters of dispute quickly and informally. There are those, however, who believe that the appeals system has evolved into a process which seriously curtails the ability of the Forest Service to implement important management programs.

I am very much concerned that the number of appeals filed with the Forest Service has increased substantially in recent years. This has resulted in a serious backlog the implications of which transcend Forest Service boundaries. Prolonged delays of management efforts can impact employment and thus the health of rural communities. This comes at a time when our rural communities continue to fight for their very existence.

I know that the U.S. Forest Service has recently adopted revised appeals procedures. These new regulations actually split the appeals process into two categories: one-on-one occupancy and use authorizations; and land use and management plans. Because these new regulations have been in effect only since February, it is too soon to evaluate their success.

As you know, Mr. Chairman, Missouri is the home of 1.8 million acres of national forest, the Mark Twain National Forest. While we are proud of this pristine wilderness, we have not escaped the controversy surrounding land use issues. Our Forest Service officials have worked hard to resolve these differences. However, there will always be cases which cannot be resolved to everyone's desires. The question then arises what can be done to ensure that continuous appeals don't become pure and simple harassment?

It would seem that the very real threat of an appeal keeps the Forest Service on its toes when developing land and resource management plans. While the appeals system is an integral part of our right to express our views, we should not let it be used for purposes of harassment or a roundabout attempt to change the basic objectives of the U.S. Forest Service.

Assuming that the new appeals procedures are successful in resolving future conflicts, it is imperative that we focus our efforts on the backlog of its existing cases. I am pleased that Mr. Leonard is with us today. I look forward to learning more about the administration's plans to address this backlog.

Mr. Chairman, I am grateful that we are holding this hearing this afternoon and particularly appreciate the leadership of Chairman Fowler in that effort. I suspect that we will have a much better understanding of the appeals process when we get through.

Mr. Chairman, I look forward, with you and my good friend the Senator from Washington, to hearing the testimony before us today. I thank you.

Senator BAUCUS. Thank you very much, Senator Bond.

Senator Gorton, do you have a statement?

Senator GORTON. Thank you. Thank you, Mr. Chairman. No, I don't. I am very anxious to hear the testimony here today.

Senator BAUCUS. Thank you very much.

We are honored to be joined now by my colleague from Montana.

Senator Burns, welcome to the committee to begin this hearing on the appeals process. Senator Burns, if you would like to make a statement at this point, we would be honored to hear it.

STATEMENT OF HON. CONRAD BURNS, A U.S. SENATOR FROM MONTANA

Senator BURNS. Well, thank you, Mr. Chairman.

I first want to express my appreciation for the opportunity to testify before this committee on a process that is used by many Montanans to question decisions by Forest Service officials. I commend the chairman, ranking minority member and Senator Baucus for taking the lead in reviewing the appeals process and seeking ways to help the Forest Service get on with implementing its forest plans. I think this hearing can be constructive.

It is my understanding that the administrative appeals process has been around since 1906. There is no statutory requirement for the appeals process, yet for 50 years, it has been the only formal method to question or influence Forest Service decisions. I doubt that many would argue against protecting the public's right to question Forest Service activities through such a process.

However, recently the appeals process has become bogged down, and the Government's ability to meet the prescribed time requirements has been severely tested. In fact, the Forest Service has fallen behind, and the resulting inability to be timely has slowed the delivery and the availability of natural resources, primarily timber sales, from many Montana national forests.

Industries that are dependent on the supply of timber from the forests are being affected the most. This is, in turn, causing hardships on local communities. The sawmill in Dillon, Montana is shut down, and the mills in Darby and Livingston have shut down intermittently due to lack of logs. Volumes under contract in Montana have shrunk from an average of 3 years to less than 12 months.

Part of the reason for the timber supply problem is the sheer number of appeals and time that is required for resolution.

I know that some of these appeals have been filed because the appellant just plain does not agree with the practice of harvesting timber, and the appeal gives them a way to delay the action. Sometimes the appeal is filed on the basis of a surrogate issue, just to have the effect of delay or even cancellation of a sale. I hasten to add, however, that there are appeals filed that do result in changes in the management action or that point out shortfalls in the environmental documentation.

Last February, the Forest Service put in place new regulations intended to shorten the process, to limit the justifiable reasons for appeals and to allow for immediate dismissal of appeals that are without merit. These new regulations are so new we do not know that the timeframes will be reduced—but I remain hopeful.

In the meantime, the Forest Service has a backlog of over 2,200 appeals, which are averaging over 1 year to complete. Just in Montana, the backlog of appeals grew from 23 at the beginning of fiscal year 1988 to 143 at the beginning of fiscal year 1989. This compares with one appeal in Georgia and two appeals in Missouri. Nationwide, it is requiring well over $6 million worth of manpower each year to resolve these appeals. The timber sale pipeline of future sales is not being filled, partly because the needed manpower is being diverted to the appeals resolution.

Legislation may be necessary, but we must approach it very cautiously. There are questions that need to be addressed and the consequences made clear before we can take that step.

Should the backlog of 2,200 appeals filed under the old regulation be processed under new regulation to speed resolution?

Should appellants establish "standing" by requiring them to participate in the National Environmental Policy Act process in order to be eligible to appeal?

Should appellants be required to pay a filing fee?

Should appellants be required to pay cost recovery or damages if the appeal is unfounded?

Should there be a statutory time limit for agency processing?

Should there be a preappeal review by a board of peers to determine substance?

Should we do away with stays?

Should there be a mandatory negotiation before processing an appeal?

Should we statutorily define frivolous appeals so they can be immediately dismissed?

Today we are discussing the appeals process, but we need to recognize that there are other factors that contribute to the long time requirements to fill the timber sale pipeline. We have passed a host of laws that affect the management of lands and resources and it is becoming increasingly more difficult to meet the requirements of all, some of which are competing and conflicting.

There are pros and cons for many of the possible fixes, but we have to remember that very often legislation that attempts to fix something actually makes it more cumbersome and bureaucratic. I believe we need to be cautious, but we also must find ways to keep legitimate and continuing supply of timber available to timber mills before more jobs are lost—jobs that Montana can ill afford to lose.

Mr. Chairman, I have lived in, and long enjoyed, the scenic beauty of the Montana mountains, her deep blue skies, the clear crystal streams and the abundant wildlife. I want to protect those values and I would not support any activity that would contribute to their degradation. On the other hand, the national forests were set up by Teddy Roosevelt to assure a continuing supply of timber.

The main consideration or thrust in growing and utilizing renewable resource such as grass or trees, or agricultural crops like corn, soybeans, wheat, is to assure the continued conservation of two essential and basic resources—soil and water, one nonrenewable and one renewable. All growth emanates from the soil. When conservation is practiced, we can grow, maintain and harvest the renewable resources, including timber, for generations to come.

The Montana timber industry, with its hundreds of jobs, provides lumber and pulp to our economy. It is time to stand firm in a resolve to restore a balance between competing uses in our national forests.

Mr. Chairman, I again appreciate the opportunity to address your committee. I applaud your thrust in this and would be happy to answer any questions that you might have.

Senator BAUCUS. Well, thank you, Senator.

Senator BURNS. Without objection, I would like to have my statement entered in the record.

Senator BAUCUS. Without objection, all the statements of all witnesses will be included in the record.

Senator BURNS. Thank you.

Senator BAUCUS. Thank you, Senator. That was a very good statement. You have provided a lot of good constructive ideas as we try to address the appeals reform. And I appreciate the thoughtfulness of your statement.

Senator BOND. Mr. Chairman.

Senator BAUCUS. Yes.

Senator BOND. If you don't mind, if Senator Burns has a minute, I was interested in it and wanted to follow up and ask him a couple of questions.

Senator BAUCUS. Sure.

Senator BOND. Obviously, as I stated in my testimony, we don't have the same problem that you apparently have in Montana. I think we have been able to deal with it in our State.

But what is the magnitude of the problem of mills closing? Do you have a serious problem in Montana?

Senator BURNS. We have a very serious problem. There are over 240 jobs, I think, something like that, in Dillon. Of course, they're lost and gone until something is done down there. They pay about $2.4 million in payroll every year. And some of those appeals are what to some could be frivolous, but they are of larger magnitude to other people.

So it is a big problem, and especially if we lose the mills in Darby and Livingston, then we have really impacted the State of Montana as far as jobs and those type things.

Senator BOND. What is your sense, do Montanans generally support multiple use? Are you getting that kind of impression?

Senator **Burns**. I don't think there is any question about it, Senator, that the majority of Montanans support multiple use. I think they spoke pretty loud and clear last year, in fact. And their idea of multiple use is the ability to harvest a renewable resource.

Senator **Bond**. You set out the problems. Talk about the solutions. Don't leave without telling us what the solutions are.

Senator **Burns**. Well, I think that's what we are trying to do with these hearings. We are trying to have something come forward, maybe someone that has an idea. I don't know what it takes, but my first thought was should we deal with the appeals that are now in the pipeline under the new process?

In other words, the Forest Service did change the process last year to shorten the timeframe that those appeals could be considered and they also cut out one step in the process. And I am wondering—and there again I am venturing into uncharted waters—if that might be one solution. But I would be happy to hear what everybody else has to say regarding this problem too, because somebody might have an idea that we can all tie to.

Senator **Bond**. Thank you, Mr. Chairman.

Senator **Baucus**. I thank you.

Our first witness is Mr. John Harman, who is the Director of the Resources, Community, and Economic Development Division of the U.S. General Accounting Office. Mr. Harman is basically going to comment on a report that I asked the GAO to initiate last year, and I very much want to commend the GAO for this report.

I asked the GAO to look into the appeals and the degree to which appeals are causing the timber supply inventory problem in region 1. GAO did issue their first report, and this is a followup summary report, and I am very frankly appreciative of the work that GAO has done.

Mr. Harman, why don't you proceed.

STATEMENT OF JOHN W. HARMAN, DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC; ACCOMPANIED BY CHESTER JOY, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

Mr. **Harman**. Thank you, Mr. Chairman. We are pleased to be here today to discuss the Forest Service appeals system.

TESTIMONY BASED ON A RECENT REPORT

My testimony, as you said, is based on a recent report that we issued in February in which we examined the number, processing times, and backlog of unresolved appeals nationally from fiscal years 1983 to 1988, as well as whether appeals filed in fiscal years 1986 and 1987 delayed timber sales in regions 1 and 6 of the Forest Service. We will also discuss briefly the additional work we did that Senator Baucus asked us to undertake following our report, in which we examined the extent to which appeals were preventing region 1 from preparing its planned volume of timber sales in fiscal year 1988. Finally, we will talk a little bit about what we see as some of the future prospects—the extent to which these problems may continue over the next few years—for the sales in those, particularly region 1.

RESULTS IN BRIEF—APPEALS

In our February report, we found that nationwide, as the Senators have all pointed out, that the number of service appeals filed annually, the average time required to process them, and the backlog of unresolved appeals all increased significantly in recent years. Specifically, appeals more than doubled nationwide between fiscal years 1983 and 1988 from a little less than 600 to a little less than 1,300. We are talking about timber appeals, and this does exclude appeals from buyouts.

The average processing time for handling these appeals increased from 201 days in fiscal year 1986 to 363 days by March 31, 1988, which is more than 2½ times what the Service normally allows for the processing of appeals.

The nationwide backlog of unresolved appeals grew from 64 at the end of fiscal year 1983 to 830 by the end of fiscal year 1988. So there has been quite a growth, as you pointed out, in the number of appeals.

And appeals of forest plans have accounted for the largest portion of all these increases. For example, with regard to processing times, we found that 80 percent of the forest plan appeals in region 1—mainly Montana and northern Idaho—in fiscal years 1986 and 1987, had not been resolved and that they took an average of nearly 2 years to go through the appeals processing steps.

The processing of timber sale appeals also took a great deal of time, but it wasn't to the extent that the plan appeals took. And they generally exceeded the 140-day criteria that the Forest Service has for processing appeals, but they took less than one-third as long to process as the forest plan appeals. The Forest Service was responsible for about 90 percent of the processing time overruns in both types of appeals.

Regarding whether the timber sale appeals delayed the timber sales themselves, about 6 percent of the timber sale volume offered in regions 1 and 6 in fiscal years 1986 and 1987 was appealed. Less than 1 percent of the total volume was delayed by these appeals. By "delayed by appeal," we mean that one, the appeals were not resolved in time for the timber to be offered for sale in the year it was originally planned to be sold, and two, the appeals were found to have no merit. They had to meet both criteria. In about one-third of the cases in which the appeals were found to have no merit, the Forest Service contributed to the delays because it had not issued environmental analyses until the same fiscal year as the planned sales. Historically, environmental analyses had been issued 1 or 2 years before the timber was actually scheduled to be offered, and this allows sufficient time for processing the appeals.

DELAYED ISSUANCE OF ENVIRONMENTAL ANALYSES AND THE LENGTHY TIME OVERRUNS

Delayed issuance of environmental analyses and the lengthy time overruns in processing these appeals occurred primarily because the Forest Service had difficulty responding to the increasing number of complex environmental issues raised in appeals, particularly with regard to documenting the environmental effects of planned actions. Requirements for documenting these effects have been evolving through court decisions. Region 1 officials told us that many of their environmental analyses had not met all of these evolving requirements.

Because of having to revise numerous environmental analyses, regions 1 and 6 fell behind in needed advance preparation of environmental analyses for future year timber sales during fiscal years 1986 and 1987, and therefore they could not issue the analyses until the year of the planned sales. However, despite delays in some appealed sales, both regions were able to meet their annual targets for these 2 years because they still had sufficient inventories of future year sales with completed environmental analyses that could be substituted for the delayed sales.

REQUESTED FOLLOWUP WORK FOR REGION 1—TABLE 1

Now, the followup work that you requested in region 1 for 1988 showed that the volume of timber sales that were appealed or litigated had increased. There is a shift. It seems like the problem is getting worse than what we saw when we looked at 1986 and 1987.

TABLE 1

Now, if you look at the table [table 1] behind me—16 percent of the planned fiscal year 1988 sales volume was appealed or litigated, and 12 percent of this volume, of this annual target, was delayed.

As I go, if any of you have any questions about what is on these charts, feel free to interrupt me.

Senator BAUCUS. You're saying that 16 percent of the total volume?

Mr. HARMAN. The total targeted sales preparation for 1988.

Senator BAUCUS. In region 1?

Mr. HARMAN. Had been appealed or litigated.

Senator BAUCUS. Appealed or litigated.

Mr. HARMAN. Right.

Senator BAUCUS. And 12 percent represents what?

Mr. HARMAN. Was the amount of those appeals that had been delayed.

Senator BAUCUS. OK.

Mr. HARMAN. Now, that does not have the same definition. We do not use the same definition as before. That was: delayed for any reason. It could have been delayed because the Forest Service was not able to complete its environmental analyses.

Senator BAUCUS. But still, 12 percent delayed?

Mr. HARMAN. Twelve percent was delayed.

Senator BAUCUS. OK.

Mr. HARMAN. Which is an increase over what we found in 1986 and 1987.

Senator BAUCUS. What was the percent delayed in 1986 and 1987?

Mr. HARMAN. It was 6 percent was appealed, and we did not determine total delays. All we did in that work was determine how much was delayed which we felt was not justified.

Senator **Baucus**. It would be less than 6 percent.

Mr. **Harman**. And that was less 1 percent, so it would be less than 6 percent.

Senator **Baucus**. Yes.

Mr. **Harman**. So it has at least jumped from 6 percent to 12 percent.

Senator **Baucus**. At least that.

Mr. **Harman**. At least that. At least double.

Senator **Baucus**. Thank you.

Mr. **Harman**. Now, the second table——

Senator **Baucus**. If I understand that, too, there is 1,100 million board feet.

Mr. **Harman**. It's the target.

Senator **Baucus**. That was the target for 1988 in region 1. And appeals amounted to what?

Mr. **Harman**. It was 112 million board feet that was appealed.

Senator **Baucus**. Yes.

Mr. **Harman**. And that is just the appealed sales. And the litigated sales were 61 million board feet.

Senator **Baucus**. All right. Got it.

Mr. **Harman**. So those two together make up the 173.

Senator **Baucus**. Go ahead.

TABLE 2

Mr. **Harman**. OK. The next table [table 2] shows where these appeals delays impacted, and about 85 percent of this delayed volume was concentrated in 4 of the region's 13 forests. That amounted to 112 million board feet of the 132 million board feet that was delayed.

Senator **Baucus**. OK. So that is 60 million board feet on the Kootenai, is that right?

Mr. **Harman**. It was 60 million board feet on the Kootenai.

Senator **Baucus**. That's right. And Idaho Panhandle is 26 million. Then it's 16 and 10 for the Flathead and Clearwater.

Mr. **Harman**. That's correct.

Senator **Baucus**. OK.

TABLE 3

Mr. **Harman**. Now, the next table [table 3] that you will see shows what happened, the reasons for these delays were very similar to the experience that we saw in the previous 2 years for the delays that we looked at in the February report. Table 3 shows that of the 132 million board feet that was appealed and litigated and that was delayed, for all practical purposes all of it was delayed because of problems the Forest Service was experiencing in completing its environmental analyses or in the way they had completed their environmental analyses.

None of it was delayed by appeals or litigation that was without merit as determined under our definition of that.

Senator **Baucus**. Which is to say that——

Mr. **Harman**. They had to be delayed; in other words, they had to miss the sale date and they had to be not upheld. In other words, the appeal wasn't upheld; they lost the appeal.

Senator **BAUCUS**. And your second line there says "Delayed by appeals or litigation without merit." That's zero.

Mr. **HARMAN**. That's zero. We did not find any of the appeals in 1988 that met the definition of causing a delay as well as not being upheld by either the Forest Service or the courts.

Senator **BAUCUS**. So there were no frivolous appeals?

Mr. **HARMAN**. Under that definition?

Senator **BAUCUS**. Under that definition, none of the delay is caused by frivolous appeals?

Mr. **HARMAN**. Under that definition.

Senator **BAUCUS**. All right. Thank you.

Mr. **HARMAN**. Three major decisions made during fiscal year 1988—one by a court and two by the Chief of the Forest Service—were cited as a factor in most of the delayed fiscal year 1988 volume. Region 1 officials told us that these decisions required that additional analysis be done to one, ensure that standards for old growth and grizzly bear habitat are met, two, to assess the cumulative effects of related Forest Service projects, and three, to determine whether further assessment of effects of projects on the ecological character of roadless areas are necessary. Moreover, they noted that these decisions also required revisions in other completed or in-process environmental analyses for a substantial volume of future year sales in which these environmental factors were also considerations.

So what we are saying here is that there were things that happened involving the 1988 sales which, when the courts decide on them, it goes back and affects other sales that they are currently working on. So it has a multiplier effect.

As a result of having to do additional work on numerous environmental analyses for fiscal year 1988 and future year sales, the region could not complete them all as planned, and its inventory of sales with approved environmental documents became seriously depleted during fiscal year 1988. The region could no longer substitute other sales when a delay occurred in processing an appeal—something which they could do in 1986 and 1987 sales—or when an appealed sale's environmental analysis needed revision.

TABLE 4

Now, table 4, the fourth table, will show what that shortfall is against the target in 1988 in region 1, the target being 1,100 million board feet. The amount prepared was 968 million board feet, which left a shortfall of 12 percent, or 132 million board feet. This was particularly acute in 4 of the region's 13 national forests.

About one-third of the region-wide shortfall in achieving its target involved sales in which Forest Service regional officials withheld or withdrew issuance of completed environmental analyses. They took this action because they felt that, on the basis of appeal and court decisions during fiscal year 1988, these analyses would no longer meet current requirements and would be successfully appealed if they were not revised.

In addition to the Forest Service's difficulties in preparing environmental analyses that meet all requirements, we identified three other factors that contributed to the timber sale problem in region

1 in fiscal year 1988: the first being reductions in the region's funding and staffing, second the forest fires that were experienced in that region which required staff diversions, and third the absence of wilderness legislation, which made it difficult for the region to successfully offer timber in roadless areas.

PROBLEMS IN MEETING TIMBER SALE PREPARATION TARGETS WILL LIKELY CONTINUE IN THE NEAR FUTURE

Now, with regard to the immediate future, and the next few years, we believe that region 1's timber sale preparation target for the current fiscal year will probably not be met because of the problems with delayed sales. The administration proposed increasing the region's target for this year to about 1.14 billion board feet. Region 1 officials forests requested that the target be reduced to 967 million board feet, which is pretty much the same as was prepared for 1988. But the Forest Service headquarters denied this request.

The absence of complete environmental analyses will probably continue to cause problems beyond this fiscal year. In January 1989 the Forest Service adopted changes, as you have noted, in its appeal regulations that reduced certain timeframes and steps in the process, and narrowed the bases for filing timber sale and forest plan appeals. Although we believe that these changes may reduce the number and processing times of appeals, they do not directly address the problems the Forest Service has had with its environmental analyses. However, Forest Service officials told us that they believe these changes will result in greater emphasis on addressing environmental concerns in original timber sale decisions and that new requirements for early meetings with appellants will foster quicker resolution of differences. They also told us the agency has been designing staff training courses to focus on these issues, something we feel is probably needed. The effectiveness of these regulatory changes cannot be determined until they have been implemented for a longer period of time. We did note, though, that in the brief time period since their adoption, a number of region 1 timber sale and forest plan appeals have been quickly resolved through negotiation, with the result in each instance that most of the planned timber volume involved was allowed to proceed without delay. Even so, new regulations cannot address the region's most pressing immediate need, which is to rebuild the depleted inventory of future year sales with completed environmental analyses.

The Forest Service attempts to maintain a 2-year supply of future year sales with completed environmental analyses. However, as of January 1989, region 1's inventory of such future year sales fell short of the desired 2-year supply by some 1.3 billion board feet. In order to rebuild its inventory to the desired level, the region will need to dedicate additional funding to timber sale preparation beyond that required to achieve its regular yearly targets. Moreover, the costs of preparing environmental analyses have increased because of more extensive requirements. As a result, the region will also have to dedicate additional funding to timber sale preparation in order to prepare its regular yearly target volumes.

Even with dedication of these additional funds, the inventory of future year sales cannot be rebuilt immediately because it can take up to 2 years to complete the more comprehensive environmental analyses that are increasingly required.

TABLE 5

Now, the final table [table 5] that we have looks at region 1's ability to rebuild its inventory, which could also be further complicated by the increased demand for its timber as a result of the higher market prices. The timber industry harvested about 17 percent more timber from region 1's national forests than it purchased during fiscal years 1984 through 1988. Thus, the industry's own inventory of uncut timber under contract has dropped sharply at the very time the region's inventory of sales with approved environmental analyses has been depleted. If the industry is allowed to significantly expand its purchasing in the next few years in order to rebuild its own inventories and maintain harvest levels during high market prices, and higher demand, region 1's task of rebuilding its inventory of future year sales will be made even more difficult.

Senator BAUCUS. I don't quite understand. What is the point of this chart? What does it show?

Mr. HARMAN. This shows that basically the industry has been harvesting more timber than it had been purchasing. So their inventory of uncut timber is going down at the same time. So if they want to maintain that harvest level, the Forest Service is going to have to make available enough timber for sale for them to do that.

But our point is that their inventory of future year sales with approved analyses—the Forest Service's inventory—is down. So that is going to complicate the situation.

Senator BAUCUS. Thank you.

Mr. HARMAN. That concludes my prepared statement, Mr. Chairman. I will be happy to answer any questions you may have.

[The prepared statement and tables 1-5 of Mr. Harman appear at the conclusion of the hearing.]

Senator BAUCUS. Well, thank you, Mr. Harman.

To summarize what you're saying, first of all there is a very definite timber supply inventory problem in region 1.

Mr. HARMAN. That's true. It looks to us like that. And it looks like it could get worse before it's going to get better.

Senator BAUCUS. The reasons for the timber supply inventory supply shortage are several, as you see it. Number one, basically the Forest Service had difficulty in meeting the different legal criteria in preparing environmental assessments and/or environmental impact statements, and that has caused a lot of delay. Some of that delay is because various individuals have filed appeals or gone to court and sought judicial delays, claiming that the Forest Service had not met certain legal criteria under the National Environmental Policy Act, the Endangered Species Act, or conditions under the National Forest Management Act.

Is that correct? Is that one basic reason?

Mr. HARMAN. That is a basic reason. I think it has to be recognized that the Congress, in passing NEPA, the National Environmental Policy Act, did anticipate that much of the decisions in environmental policy be established under the act would evolve through court decisions. So you are automatically running into a problem where you sometimes are catching up. A decision is made in the Forest Service's case on one particular sale and, as I said before, that will cascade down to other sales, so they have to go back and redo analyses and take a look at their analyses for these other sales. Maybe in some cases it won't affect them; in others it might.

Senator **Baucus**. While we are focusing on this one reason, as you said, there are other reasons—namely, cutback in Forest Service personnel and funds, the absence, in region 1, anyway, of a wilderness bill, and third, the forest fires depleted resources—those are all additional reasons for the timber supply problem.

But as we focus on the first reason, is it fair to say that the Forest Service has had kind of a moving target; that is, there have been recent decisions by the Ninth Circuit Court of Appeals that apply to the Panhandle in Idaho and the Yaak, in northwestern Montana, that have made the Forest Service a bit gun-shy so that they are changing from environmental assessments to environmental impact statements, which are more lengthy and more time-consuming? Is that part of it?

Mr. **Harman**. That's part of the problem. In fact, that may be a good deal of the problem. And I don't know that I would take a position that the courts are necessarily to blame. It's a fairly complicated situation we're dealing with here.

But as we see it, problems that the Forest Service has had in preparing these environmental assessments—and primarily they have not gone the route of preparing environmental impact statements—has led to some of the problems, a great deal of the problems.

For instance, it seems as though to us, just looking at some of the documentation that is available on this, that a lot of it has occurred because the Forest Service has taken the road of trying to avoid site-specific environmental assessments, environmental impact statements, and the courts—thinking of course that that would be OK to take that kind of strategy—the courts have basically said no, that is not the way you can go, which means they have to go back and reassess.

Senator **Baucus**. How much more time and effort is involved with an environmental impact statement compared with an environmental assessment?

Mr. **Harman**. Well, it's a great deal more time. I think you have to allow about 2 years to complete an environmental impact statement.

Senator **Baucus**. I understand, too, that the Forest Service generally likes to plan sales or plans at least 2 years in advance in order to have time to correct any problems in that area.

Mr. **Harman**. That's correct. It's basically pretty much a 6-year process to prepare a sale and to bring it up and have it available for sale at the time that they plan to have it.

Senator **Baucus**. But this additional requirement has compressed the timeframe within which they have to make decisions. How does that work?

Mr. HARMAN. Well, they have kind of gotten behind the curve. Had they went with environmental impact statements from the very beginning, it's hard to say whether or not they would have had the number of appeals they have now.

As our testimony showed, we haven't found that the appeals that have been made are without merit. In other words, they are, for the most part, being upheld. So there is some basis for these appeals.

Now, to speculate and look backward and say if they would have prepared environmental impact statements, which is more lengthy, that maybe some of these appeals would have been avoided and these sales would have met their targets, it's very hard to make that kind of a judgment.

Senator BAUCUS. Let's go back to the frivolous-appeals question. I don't want to put words in your mouth, but it did strike me as a bit stunning that according to your definition of appeals that have merit, that none of the delay was due to appeals that did not have merit. Is that correct?

Mr. HARMAN. That's correct. In other words, those 16—or 12 percent, I believe it was, of appeals that were—16 that were, I think, appealed and then 12 percent that were delayed.

Senator BAUCUS. Now what do you mean when you say they have merit?

Mr. HARMAN. Well, the appeals, of those 12 percent, we could not find any of them—12 percent resulting in delays—none of those appeals were denied. In other words, they were all upheld. So they were not appeals without merit.

Senator BAUCUS. Upheld at what level?

Mr. HARMAN. Well, the Forest Service, I believe, or the courts. I think for the most part it's the Forest Service.

Senator BAUCUS. Forest Service and/or the courts?

Mr. HARMAN. Right.

Senator BAUCUS. I see.

Now, you also say an additional reason for the shortage in timber supply inventory is lack of funding. Could you kind of go into that a little bit as to the degree to which you think that is a factor here?

Mr. HARMAN. Well, it's certainly going to be a factor in the future because of the need to go back and reassess and redo some of these environmental assessments, at the same time having to prepare future sales. I know that the Forest Service has prepared some cost estimates of what that will involve.

From our standpoint, we don't know. We did not take a look at that issue to be able to say how much additional funding may be needed through appropriation or how the Forest Service might be able to meet those needs internally by reassigning resources and whether those types of resources are even available. So it's hard to say at this point where that funding should come from.

Senator BAUCUS. The shortage is because there was a drop in Forest Service funds between 1981 and 1986 of 15 percent. A 15-percent reduction. Is that basically right?

Mr. HARMAN. I think that's right. Yes, in real terms, 15 percent.

Senator BAUCUS. That is in real terms. The Forest Service had a 22-percent reduction in personnel during that same period of time. Is that correct?

Mr. HARMAN. I believe that's right. That's correct. In region 1.

Senator BAUCUS. In region 1.

Also, it is my understanding that to bring the timber sale inventory back up to where we were on a nationwide basis would require an increase of $92 million for fiscal year 1990. Is that correct?

Mr. HARMAN. Rather than me continuing to turn around here and ask my evaluator, who did this work for me, why don't I get Chet Joy up here to the table.

Senator BAUCUS. Chet, identify yourself, please.

Mr. JOY. Yes, Senator. I am Chester Joy, General Accounting Office.

Mr. HARMAN. Chet was the evaluator in charge of this work.

Senator BAUCUS. All right. Thank you.

Mr. JOY. Senator, we did not look at, nationwide, first of all, the figures, and we have only looked at it from a cursory standpoint with regard to region 1. But I don't think we found anything in our brief review of the Forest Service figures that leap out at us that would suggest that they are out of line.

Senator BAUCUS. I'm sorry?

Mr. JOY. I don't think we have seen anything in the figures that we have seen that suggest they are grossly off. But we have not looked at it in detail as far as region 1 is concerned.

Senator BAUCUS. So what would be a rough amount for region 1?

Mr. JOY. I don't know what their latest numbers are, and it would probably be better to get the numbers from them. We did look basically at what they did——

Senator BAUCUS. Well, I have some more questions, but I don't want to take the time away from Senator Bond.

Senator, why don't you go ahead.

Senator BOND. Well, just a couple of things. Is it fair to say that many of these appeals, if they were frivolous appeals, would be thrown out at the forest supervisor level? You did not take a look, I guess, at that, did you?

Mr. HARMAN. Well, I think that what we have found is that the frivolous appeals tend to be resolved fairly quickly. And of course, if the analysis is not as good as maybe it should be, who knows, the appeal could be frivolous and we at that point may not even know because the basis to argue that appeal may not be there.

So the stronger the analysis is, the less chance that you will have these kind of appeals that could be considered frivolous. As I said, we have not identified any of those types of appeals at this point. In other words, all the appeals that we looked at did have merit.

Senator BOND. Well, but you pointed out how much more complex the environmental impact statement is. I assume that people filing these appeals know the process and therefore can recite the specifics or make a challenge on that basis.

But is your analysis essentially that the appeals followed the framework of raising questions and did not miss the necessary procedural steps?

Mr. HARMAN. That was what we found, I believe.

Chet, you can speak to that.

Mr. Joy. Yes, that's correct. For instance, Senator, there weren't any that were determined to be—we looked at all appeals, including those that the Forest Service supervisors kicked out at the lower level—all of them followed the steps. It just took, especially forest plan appeals, quite a long time in the Forest Service's steps that it was responsible for to respond to those complexities.

Senator Bond. So there is no way it could be a frivolous appeal so long as they followed the correct steps? Is that what you're saying?

Mr. Joy. Yes, sir. They would be dismissed, and there were dismissals based on two factors: first of all, filing late, which is one standing issue; and secondly, if they did not state a statement of reason in their statement of reasons something that could be addressed by the Forest Service because it was a legitimately stated issue with the action. In other words, they had to state a good reason within the law which the Forest Service could also address.

Senator Bond. So if I understand you correctly, you are saying that you are making this analysis on procedural grounds, you did not have the basis to make a substantive judgment?

Mr. Harman. That's correct.

Senator Bond. You're saying procedurally they followed the correct steps?

Mr. Joy. That is basically correct, yes, because we didn't make a qualitative judgment on the appeals themselves.

Senator Bond. There's no way that you can say then if the procedural steps were followed, even if turned out that what was alleged was not going to be sufficient grounds, there is no way you could find it would be a frivolous appeal so long as they followed the process?

Mr. Joy. Yes, sir. There are two things, I think, that I was addressing before. First of all was whether or not people were filing appeals that simply didn't like something for reasons that were totally extraneous and would be thrown out immediately.

If I understand your question correctly, you're saying that when we examined the appeal itself and the Forest Service or a court made the determination that the Forest Service did not in its original decision follow the correct procedure it therefore ordered them to go back and do it again. Your question was whether or not those were the kinds of problems we found versus something substantively wrong with the original decision. Is that what you're asking?

Senator Bond. Well, I think that's part of it. But what I am asking for is what you would consider a frivolous appeal. It's one that——

Mr. Joy. One that the Forest Service or the courts said essentially that they threw out.

Senator Bond. Not based upon——

Mr. Joy. Based upon no merit, on a statement that said the appellant was wrong. That we included all of those where they said the appellant was wrong, period, whether it was a frivolous reason they were wrong, whether they're very serious and it was a close question or not and they were still determined to be wrong, we really didn't try to determine frivolous at all, it was just simply right or wrong.

Senator **Bond**. But now going back to the charts, and maybe I missed something in the charts, what percentage of those—and you showed charts showing essentially no frivolous appeals, back several charts ago.

Mr. **Harman**. In region 1.

Do you have that chart?

Senator **Bond**. And that there were no——

Mr. **Harman**. This is in region 1 in 1988. There were, according to this, 132 million board feet that was appealed or litigated, and none of those we found that were delayed because of appeals that were found to be without merit. In other words, there were no appeals that were found by the courts or the Forest Service of those that involved the 132 million board feet that were for some reason denied or thrown out.

Mr. **Joy**. And that were delayed.

Senator **Bond**. But what is the status? I mean these are still in process then?

Mr. **Joy**. No, sir. All those have been resolved except the 3 percent or the 2 percent on the bottom.

Senator **Bond**. The 129 of them, in every one of those the Forest Service had a faulty environmental analysis?

Mr. **Harman**. Problem with the environmental analysis. That's correct.

Mr. **Joy**. By their own judgment, not ours.

Senator **Baucus**. Theirs and the courts?

Mr. **Harman**. And the courts.

Senator **Bond**. All right. Did you make any assessment whether the process has become so burdensome that Congress has imposed a very difficult burden on them? Have you made an evaluation of the previous procedure versus the current environmental impact statement procedure to determine whether the legitimate environmental concerns were inadequately addressed before and are now adequately addressed?

Mr. **Harman**. No, we did not. That wasn't part of what we did in this assignment.

Senator **Bond**. Was the Forest Service just making bad judgments, or did they have too great a burden put on them?

Mr. **Harman**. Some of it had to do with just what the Forest Service felt that they had to do to meet the requirements of NEPA. And of course those requirements are evolving, they are continuing to evolve.

Senator **Baucus**. Could you explain that for Senator Bond? As I understand it, the *Panhandle* decision set a new standard in the ninth circuit as did the *Yaak* decision. There are lots of new or evolving standards—I don't want to get into that, but that is very much a part of it, as I understand the problem.

Mr. **Harman**. And some of it, as I said earlier, some of it was because the Forest Service made judgments about how much was needed to justify its position from an environmental standpoint. So as they made these decisions, and we found looking at some of their documentation and some information that came out of their general counsel, the general counsel felt like in some instances they were making decisions and justifying themselves environmentally on a whole-forest basis instead of a single-sale basis or a specific-site basis. They were losing these appeals that involved those kind of justifications.

And also, they were making some mistakes in terms of contiguous projects—as they would make an environmental impact statement on, for example, a road, and the courts would say you just can't look at the impact of that road, you have to look at the impact of the whole sale because you're building that road for more than just building a road.

So they got into those kinds of situations where they had to go back.

Senator BOND. Do you have any particular—the cumulative effects of those kind of decisions?

Mr. JOY. The *Yaak* decision that the Senator mentioned was one that represented almost half of the delayed volume as a single court decision. That's in the Kootenai Forest. It will have a lot of outyear impact as well, far more than even 1988, that particular decision.

However, it's my understanding the Forest Service has just about completed its revision. It has taken them, oh, perhaps on the order of a year or so to—they're revising the original one to take in account all of the cumulative effects of the connected actions in relation to that. So that it has taken them time to redo it.

Senator BOND. Thank you, Mr. Chairman. I think I have asked enough questions of these witnesses.

Senator BAUCUS. Thank you, Senator.

Another reason that you mentioned, Mr. Harman, for delay in timber supply inventories is the lack of the passage of a roadless acreage bill in region 1. Could you explain that and expand on that, please? You said that was an additional reason for the delay and the reduction in timber supply inventory in region 1.

Mr. HARMAN. What is happening is because of the lack of a bill, a wilderness bill for that area for Montana, the Forest Service is avoiding sales in those roadless areas and they are pushing those sales toward the end of its 10-year sale period, which means that they are trying to rely on a lesser inventory that they have available to meet their sale volumes. And once the bill is passed, they will have a better idea of which of those areas that they will be able to go in and open up for sale and which ones of course that they cannot do. And I guess, simply put, that is pretty much the problem.

Once the bill is passed, they will be able to plan against those. By pushing them more toward the end of the period, also, some of those roadless areas have higher-cost timber; in other words, it's not in areas that are as economical to harvest. So they may be pushing off a problem that we will have to deal with 5 or 6 years from now. But the sooner that bill is passed the better off the Forest Service is going to be.

Senator BAUCUS. That is a very interesting point because as you well know, there is about 6 million acres of roadless inventory in the State of Montana. The wilderness bill the Congress passed and the President vetoed last year provided for approximately 1.4 million acres of wilderness and approximately 4.2 or 4.3 million acres to be released back to the forest plans.

So what you're telling us is that it is the opinion of GAO that the passage of that bill would have helped increase the timber supply inventory in the State of Montana and therefore the passage of that bill would help alleviate some of the timber supply shortages that we now have. Although the lack of the bill is not the entire reason, it is a partial reason. Is that correct?

Mr. **Harman**. Well, I am not going to advocate any particular piece of legislation.

Senator **Baucus**. But you said that that bill, as I understand it——

Mr. **Harman**. But, yes, the passage of a bill which would lay out for the Forest Service what they can and cannot do basically would open up those areas and make them available for their use to make sales. And the longer that is delayed, the more difficulty in the end that they are going to be faced with.

Senator **Baucus**. Another reason you mentioned is forest fires. Is that also a reason for the delay?

Mr. **Harman**. Well, for the region for 1988—and somewhere I do have some numbers on that.

Chet, if you will help me out. Go ahead.

Mr. **Joy**. The numbers, Senator, although it's very hard to pin down what somebody was working on out in region 1 at what particular sale, what year it was, information for the region suggests about 300 million board feet of timber was interrupted in its preparation. But that's not for 1 year, that's 1988 through 1983. So over about a 5-year period. And that's what was delayed.

That doesn't necessarily mean that it will be lost totally. We are not talking about forest fire losses, just staff diversion.

Senator **Baucus**. OK. Now so that means that the solutions to this problem, as I understand, are several, in your opinion: One is to have bulletproof environmental impact statements?

Mr. **Harman**. Well, yes, that would be good. [Laughter.]

Senator **Baucus**. That is, environmental impact statements that are solid, that stand.

Mr. **Harman**. Sure, that would solve the problem to a large extent.

Senator **Baucus**. Although is it also true that that would, under current law, tend to be a double-edged sword because to the degree they are bulletproof that might tend to lower the ASQ? Is that a factor?

Mr. **Harman**. That's true. That's the dilemma.

Senator **Baucus**. A second solution is the passage of a wilderness bill. Without advocating a particular bill, is the passage of a wilderness bill which would allow the balance of the acreage in the roadless inventory in the State to be released a partial solution?

Mr. **Harman**. I think those two things would go a long way to helping solve the problem.

Senator **Baucus**. A third solution would be additional funding to the Forest Service so they could work on that timber sale pipeline to provide more inventory and more quickly process some of these environmental impact statements; is that also true?

Mr. **Harman**. That is also true.

Senator **Baucus**. Any other solutions?

Mr. **Harman**. Well, I just, I guess, would make one comment.

Senator BAUCUS. Sure.

Mr. HARMAN. It's a comment that is, I guess, fairly obvious to most people in this room that are familiar with this issue. Even with ironclad environmental impact statements, it is going to be always a very difficult issue to deal with because we have conflicting goals with this program. One is the multiple use and the environmentalists who want to keep the land at a certain condition versus industry which needs that same resource to meet its needs and its, and of course the economy's, needs for timber. So there is always going to be that rub.

I would hope at least, though, that a better process of preparing these environmental statements as well as perhaps at least a better communication, lines of communication, between the two parties would also help as well as passage of the bill.

Senator BAUCUS. Well, that is a good point. The more we can have negotiations among the parties so that there is an agreed-upon settlement, the better. The alternative, often, is litigation and litigation tends to polarize and litigation also tends to spawn more lawsuits.

What can we do to help parties to negotiate, to avoid some of these things?

Mr. HARMAN. Well, I guess crisis always helps people to negotiate, and it could be, unless something is done to help alleviate, particularly in region 1—and now in region 6, with the spotted owl situation, we don't know what that's going to involve—but it is going to be at some point in time to everyone's advantage to sit down and start negotiating these.

Senator BAUCUS. That is an excellent point. And frankly, it is getting to approach the point where if there is not a resolution, Congress might be forced to legislate a solution. You know, that might be the crisis.

Mr. HARMAN. And the difficulty there——

Senator BAUCUS. I would encourage the parties to get together and negotiate an agreement because I think most people in most communities in our country don't want outside forces telling them what the solution is. That is, they don't like a court to tell them what the solution is and probably they'd rather not have the Congress tell them what the solution is.

It is my hope that, with the threat of either a judicially imposed solution or a legislative solution, the parties could sit down and negotiate and solve this among themselves.

Mr. HARMAN. We know one thing for sure: they certainly don't like GAO to tell them what the solution is. [Laughter.]

Senator BAUCUS. Well, on that note, thank you very much for your testimony.

If you don't mind, I would like to ask you to stay because there may be other questions that we may want to ask you because of the statements of some of the next witnesses.

Thank you very much.

Mr. HARMAN. Thank you.

Senator BAUCUS. Our next witness is Mr. George Leonard, who is the Associate Chief of the Forest Service.

Mr. Leonard, you have heard the General Accounting Office analyze the problem as they see it from their perspective, which is a little bit farther away, more distant from your perspective.

We very much look forward to your analysis from your point of view. Thank you for coming to join us and explaining the problem as you see it. We look forward to your testimony.

STATEMENT OF GEORGE M. LEONARD, ASSOCIATE CHIEF, U.S. FOREST SERVICE, WASHINGTON, DC; ACCOMPANIED BY BOB SCHRENK, TIMBER STAFF OFFICER, NORTHERN REGION

Mr. **LEONARD**. Thank you, Mr. Chairman.

I am accompanied by Bob Schrenk. Bob is with the timber management staff in our regional office in Missoula and knows much of the situation there firsthand.

TIMBER SUPPLY PROBLEM IN MONTANA

There is a timber supply problem in Montana. The volumes under contract to the dependent industry are falling rapidly. The volume decreased by some 236 million board feet in fiscal year 1988 to the lowest level since 1962. In the first 6 months of this current fiscal year the volume under contract has declined another 329 million board feet.

And the problem is not equally spread across the regions. Some forests are in better shape than others. The volumes have decreased at really critical levels on the Beaverhead, the Gallatin, and the Bitterroot. And as was indicated by Senator Burns, mills have closed for lack of logs.

Senator **BAUCUS**. Can you tell us the volume reduction on the Gallatin and the Beaverhead compared with other forests?

Mr. **LEONARD**. We can provide that information.

Senator **BAUCUS**. Would you, please?

Mr. **LEONARD**. Yes.

Senator **BAUCUS**. Thank you.

[The information was subsequently provided for the record and follows:]

In fiscal years 1988 and 1989, the reductions were 11.0 and 9.7 million board feet on the Beaverhead National Forest and 12.9 and 15.4 million board feet on the Gallatin National Forest respectively.

A NUMBER OF CAUSES TO THIS TIMBER SUPPLY PROBLEM

Mr. **LEONARD**. There are a number of causes to this timber supply problem. Markets have been unusually good for the last 3 years, and we are harvesting record volumes of timber. Timber sale preparation activities were disrupted this last summer and in 1987 by the catastrophic fires. In 1987, not many fires in Montana, but a lot of the people from Montana went out to California and Oregon to help fight fire, and in 1988 they had the fires right there, and people were diverted from sale preparation activities.

APPEALS AND LITIGATION HAVE RESULTED IN DELAYS AND WITHDRAWALS OF TIMBER SALES

Appeals and litigation have resulted in delays and withdrawals of timber sales, and they have also identified the need for us to go back and rework previously prepared sales to bring the NEPA documentation up to standard.

UNRESOLVED STATUS OF THE WILDERNESS PROPOSALS IN MONTANA

A major source of the supply problem, as in your discussion just now with GAO, has been the unresolved status of the wilderness proposals in Montana. Timber harvest levels in that State are predicated on access to timber in many of the currently unroaded areas. In fact, about 25 percent of the volumes scheduled for harvesting this decade is planned to come from roadless areas in region 1.

People and organizations who would like to see these areas designated as wilderness have effectively used the administrative appeals process and litigation to block or slow entry into these areas.

Appeals and litigation in region 1 have been concentrated on four forests: the Gallatin, Beaverhead, Flathead, and Kootenai. On these four forests, 37 sales involving some 176 million board feet have either been appealed or challenged in lawsuits in the last 2 years. Eight of these sales, with some 59 million board feet, are tied up in a lawsuit on the Kootenai, the *Yaak* lawsuit.

Decisions have been affirmed or appeals otherwise resolved in 7 sales, and 19 million board feet of that 176 has now been sold.

DECISIONS MADE BY RANGERS OR FOREST SUPERVISORS ARE UPHELD IN THE DECISION PROCESS

In reviewing the appeals nationwide, we find that in most cases decisions made by rangers or forest supervisors are upheld in the decision process. In other words, we find out that we have done the job and the decision was proper.

However, in looking at recent appeals in region 1, we find that there is a substantial number of appeals particularly where the NEPA documentation associated with the entry into roadless areas have been inadequate This is just specifically what GAO was referring to.

A major problem has been the consideration of the cumulative impacts of all the planned activities in roadless areas being entered for the first time.

Frankly, as you noted in your opening statement, the standards for NEPA compliance have been changing. A series of decisions in the ninth circuit has placed emphasis on looking beyond the impacts of individual timber sales to the cumulative impacts of all foreseeable activities in the area affected by the sale or road.

We had anticipated that our environmental impact statements on forest plans would provide adequate documentation of the programmatic impacts of the timber sale program and that an environmental assessment of an individual sale tiered back to that forest plan EIS would be adequate to deal with the site-specific implications of the sale.

ENVIRONMENTAL IMPACT STATEMENT—PREPARATION

However, recent court decisions lead us to believe now that in order to successfully meet NEPA requirements for entry into the roadless areas to standards that are acceptable in the ninth circuit, we will generally have to prepare an environmental impact statement documenting the site-specific impacts of all foreseeable impacts in addition to the programmatic environmental impact statement we have prepared on the forest plans.

PREPARATION OF A TIMBER SALE TAKES 3 TO 5 YEARS

Preparation of a timber sale takes 3 to 5 years. Therefore, there are always a large number of timber sales in the pipeline at any one time. Region 1 makes about 400 sales a year, which means that some 2,000 sales are in the pipeline in some stage of preparation. And when NEPA standards change or are reinterpreted by the courts, it means going back to redo not just the current-year sales but the full 2,000 sales that have been in preparation.

NEPA REWORK HAS SUBSTANTIALLY SLOWED THE COMPLETION OF TIMBER SALE PREPARATION

This NEPA rework has substantially slowed the completion of timber sale preparation. It has also meant that decisions to make sales are delayed to the point that an appeal cannot be resolved without delaying the planned sale date.

The region is working hard to get on top of its NEPA problems and to catch up on sale preparation. But the program will remain vulnerable until this is done.

I would like to point out that while appeals and lawsuits have revealed procedural deficiencies in complying with the National Environmental Policy Act, there have been no decisions in either appeals or litigation identifying substantive violations of other environmental laws or of the standards and guidelines in forest plans.

Appeals play an important role in the management of the national forests. The Forest Service makes every effort to delegate decisionmaking to the lowest possible level. We want the decision to be made by people who are most familiar with the conditions on the ground.

But in making these delegations, we create opportunities for different interpretations of regulations and procedures. The appeals process gives people who may be adversely affected by a decision an opportunity to have it reviewed by a higher level. And it is an important part of ensuring that we remain responsive to the public.

In February we made changes in our appeal regulations to standardize or to streamline the process and to try to encourage resolution of disputes outside the appeals process. It is really too early to evaluate the changes, but frankly we are encouraged that both objectives are being achieved.

Mr. Chairman, I would be happy to respond to any of your questions.

[The prepared statement and attachments of Mr. Leonard appear at the conclusion of the hearing.]

Senator BAUCUS. Thank you very much, Mr. Leonard.

As you know, in the last 15 cases that have gone before the Ninth Circuit Court of Appeals, the Forest Service has lost. So the Forest Service is now batting 0 for 15. Why? What's happening?

Mr. **Leonard**. We have a better batting record in some of the other circuits. [Laughter.]

Senator **Baucus**. That may be.

Mr. **Leonard**. Yes. We have tried to utilize environmental assessments tiered back to forest plan environmental impact statements, and we simply have not been successful in convincing the ninth circuit that that provides adequate consideration of the environmental impacts and that in fact in order to comply with the National Environmental Policy Act those kinds of decisions must be documented in a full-blown environmental impact statement.

Senator **Baucus**. But what's going on? How can you lose 15 in a row? I mean that seems a little bit dramatic.

Mr. **Leonard**. It is dramatic, and it is most frustrating.

Senator **Baucus**. But why? Again, why? What's happened?

Mr. **Leonard**. Some of it we can say has been the result of evolving standards. Some of those decisions that we have lost in recent years, if we had presented the same decisions to the court 5 years ago might very well been accepted. The NEPA law has been evolving.

Senator **Baucus**. Does the Justice Department have good lawyers, or what is it?

Mr. **Leonard**. Well, I think so. I think overall, on individual cases sometimes we are concerned about the fact that the Justice Department attorney may not have adequate time to prepare a Forest Service case which he may never have worked on our cases before. But overall the relationship between our general counsel and the Justice Department I think gives us reasonable representation in the courts.

Senator **Baucus**. But once an action is filed and it gets up to the ninth circuit, essentially it's out of the hands of the Forest Service, isn't it? Isn't it in the hands of the Justice Department?

Mr. **Leonard**. Well, yes, but we work very closely with them and between our general counsel and the region involved we are involved in helping the Justice Department determine the strategy. But I point out that most of those cases or a good share of those cases that we lost in the ninth circuit we had actually won at the district court level.

Senator **Baucus**. Well, this is all very much a concern to all of us in Montana. In this respect, as you well know, the Forest Service has been dealt a setback in the Yaak in northwestern Montana. And as a consequence, in the last year the Forest Service was asked to go back and redo environmental impact statements addressing cumulative effects in the Yaak.

As I understand it, the draft EIS is going to be released today. I am asking you what you can do in the Forest Service in terms of devoting more resources to developing the final EIS so that we can put up timber sales and people can go back to work.

I can tell you, having visited that part of the State just a couple of weeks ago, that they are livid. I mean they are outraged. Every place I went, particularly around Libby and Eureka, they kept asking me what's happening with the Yaak.

What assurance can you give folks in Montana that you're going to devote the resources necessary to get the EIS out so that we can put some timber up for sale?

Mr. **Leonard**. We are in fact devoting efforts. We have sent people from the Washington office out to help both from our general counsel's office and from our land management planning shop, people who we regard as full experts in the preparation of environmental impact statements, to ensure that the documentation that we are doing on those meets the current state of the art as we interpret the decisions in the Ninth Circuit Court.

Senator **Baucus**. Well, I will be watching that very closely, and I know Senator Burns will too. It is imperative that the Forest Service devote the resources needed to get the Yaak final EIS completed. The fact of the matter is the Forest Service is at fault in the sense that last year the court said the Forest Service didn't do a good job. People were relying upon the Forest Service at that time, and now here it is a year later and we still don't have a final EIS.

Mr. **Leonard**. You know, we can talk about evolving standards of NEPA and what-not, and they are a problem, but the fact is it's our job to do an adequate job with NEPA and get those sales out on a timely manner, and we have not been doing that.

Senator **Baucus**. You heard the GAO say that, in their analysis, of 1988, none of the delays in region 1 were due to frivolous appeals. They said all the delays that were due to appeals and or court decisions were based on merit. Do you agree with their assessment?

Mr. **Leonard**. Yes, I would share that view.

Senator **Baucus**. That is to say that none of the delays were due to "frivolous appeals."

Mr. **Leonard**. No. In fact, I would go further, in a sense, than GAO did. Simply because we uphold a decision doesn't mean that that appeal was frivolous. There are some close calls, and so people should have the right without being termed frivolous to question our decisions and even though we ultimately end up upholding the decision.

Senator **Baucus**. How much will the streamlining of the appeal regulations really go to the heart of the problem, or will the changes really just be a glancing blow and not really go to the heart of the appeals problem?

Mr. **Leonard**. To the extent that the problem in region 1 is our inadequate preparation of the NEPA documentation, the new appeal regulations will not affect that at all.

Senator **Baucus**. And to what extent is the problem?

Mr. **Leonard**. In 1988 it was 100 percent. That was the problem.

Senator **Baucus**. And also, is it true, as the GAO says, that part of the timber supply inventory problem is also due to cutbacks in Forest Service personnel and funding? Is that part of the problem also?

Mr. **Leonard**. Well, it certainly has impeded our ability to get on top of that. I had information on a just slightly different timeframe than you were referring to. Between 1980 and 1988 the Forest Service workforce was reduced by 15 percent.

Senator **Baucus**. By 15 percent between 1980 and 1988.

Mr. **Leonard**. Yes.

Senator **Baucus**. I see.

Mr. **Leonard**. And the workload has not gone down in that period of time, it has grown considerably.

Senator BAUCUS. In fact, one can say the workload has gone up; is that correct?

Mr. LEONARD. Yes. In all areas. Recreation and——

Senator BAUCUS. In part, because of the standards that at least the ninth circuit has imposed upon the Forest Service.

Mr. LEONARD. In terms of NEPA requirements. But just the overall things that we do out on the forests. So we don't have the resources that we had a few years ago to get on top of a problem when it develops.

Senator BAUCUS. GAO also said that it is their view that the passage of a roadless bill for the State of Montana would help, but not totally alleviate the timber supply shortage. Is that correct, too, in your view?

Mr. LEONARD. I think it's important that we take a step toward resolving the controversy over management of the roadless areas in region 1. It will not be a panacea. In other States where we have wilderness bills, we continue to have disagreements and controversy over the entry into those areas, and they ultimately show up in appeals and lawsuits. But we are being successful in many of those other States in getting into roadless areas when we finally do the job in terms of NEPA compliance and what-not.

Senator BAUCUS. But again, even though it's not a panacea, it is a partial step toward a solution?

Mr. LEONARD. It's one of the important steps. And I think it's important to understand that there is not one simple answer. The problem is the result of a number of things and all of those issues have got to be addressed if we are going to get the program back on track.

Senator BAUCUS. Did the Forest Service so advise the White House last year that passage of a wilderness bill would help alleviate the timber supply problem? [Laughter.]

Mr. LEONARD. We were certainly involved in making the recommendations on that issue. [Laughter.]

Senator BAUCUS. Could you also address the degree to which the forest fires diverted personnel and resources away from timber sale preparation.

Mr. LEONARD. We don't have any precise measures on that. But in 1987 we moved essentially half of the Forest Service to California and southern Oregon for a period of about 4 weeks.

Senator BAUCUS. And to Yellowstone Park, too?

Mr. LEONARD. Well, that was in 1987.

Senator BAUCUS. Yes.

Mr. LEONARD. In 1988, from about the first of July until the snow began to fall around the end of September, we had major diversions of people from other work to firefighting. We played a major role in fighting the fires in the park as well as the surrounding forest and elsewhere in region 1. 1988 was a very serious fire year. So effectively we lost 2 to 2½ months of the best part of the field season with people diverted to fighting fire.

Senator BAUCUS. Is it true that prior to 1985 the Forest Service allocated separate funds for advance preparation of sales due to environmental problems, but since 1985 that is no longer the case?

Mr. LEONARD. Yes. It wasn't really for specific environmental problems. It was just to have enough volume prepared so that there was a degree of certainty that we could in fact be able to make our sale program and if one sale was delayed for whatever reason—it might be our inability to get a right-of-way or some other factor—then you had another sale that you just moved up into its place.

If you go back over the last 20 years, we went through periods when we had money for advance preparation and then we would go for a few years without it and depended upon the push on our budget over time. But in a number of years over the last 20 years we have had specific funding to try to get ahead.

In this current fiscal year we do have funding of about $22 million provided by the so-called excess timber receipts that developed in 1988. And so we are making progress in getting ahead on timber sale preparations this current fiscal year. In fact, we entered this fiscal year nationally with only about 48 percent of our sales fully prepared and ready to go, and we anticipate that by the end of this fiscal year we will have almost 60 percent of those sales prepared in advance.

Unfortunately, as you look at the budget for 1990, the volume of sale preparation financed is below the volume actually to be sold, and so we will lose that lead time by the end of 1990.

Senator BAUCUS. In your new regulations, why didn't you require bonding of appellants?

Mr. LEONARD. We simply thought that that would impede access to a very legitimate part of the Forest Service decision process, impede access to individuals, and would kind of turn the appeal process only over to the major organizations and people who have the resources to do that.

The appeals process is an important way of keeping Forest Service decisions responsive to the public, and we didn't think it was desirable. We looked very carefully at that issue, but we simply didn't think it was desirable to put a price tag on keeping the Government responsive.

Senator BAUCUS. So what are the solutions now? One is passage of a roadless bill. That is partial.

Mr. LEONARD. Yes.

Senator BAUCUS. More funding, if we can get that?

Mr. LEONARD. Adequate funding to get on. We have got to do a better job of training our people to what is in fact an adequate environmental impact statement. And we are working to do that. We have developed a series of training courses that we are now implementing.

Senator BAUCUS. I don't want to be too dramatic about this. But I will tell you, in our State of Montana there are some very dramatic shortages and they are very imminent. It takes a while to get at some of the solutions you have mentioned.

What do you suggest be done in some of those very critical areas of Montana? For example, the Yaak is one that comes to mind.

Mr. LEONARD. The regional forester in region 1 is shifting resources within the region to those forests that have the major problems. Where he has some forests that are not quite as critical, he is pulling some of the resources off those forests and moving them to the Kootenai. I think he has got enough resources now to move as rapidly as possible on that EIS on the Yaak. He has moved additional resources onto the Gallatin and to the Beaverhead to try to deal with those problems.

Senator **Baucus**. One final question here. Is there anything that GAO said that you disagree with?

Mr. **Leonard**. No. No. I think they did a good job of analyzing the problem.

Senator **Baucus**. One other final question. Sometimes representatives of the forest products industry believe that the Forest Service grants stays too easily; that is, there is a bias toward granting a stay, within the administrative appeals process. Do you have any reaction to that?

Mr. **Leonard**. There is something of a bias in the sense that if we allow a timber sale to go ahead while the appeal is pending, we are really moving and rendering the appeals process meaningless.

Now, there is a solution to that, however, and that is to get far enough in advance on our sale preparation so that we make the decision and announce the decision and start the period for running the appeal far enough in advance of the time when we want to sell the sale that we can run through the process without——

Senator **Baucus**. But do you also consider the economic impact on, say, the mills or jobs?

Mr. **Leonard**. Yes. Yes, we do.

Senator **Baucus**. You do?

Mr. **Leonard**. We do.

Senator **Baucus**. This impact is considered in deciding whether or not to grant a stay?

Mr. **Leonard**. The granting of the stay is a discretionary decision.

Senator **Baucus**. But you consider both the environmental as well as the economic impacts?

Mr. **Leonard**. That's right. But we do have a bias toward granting the stay in order to preserve the legitimacy of the appeals process.

Senator **Baucus**. Thank you very much.

Mr. **Leonard**. Thank you, Senator.

Senator **Baucus**. Our next witnesses are two on a panel. They are Mr. Jim Riley, executive vice president of Intermountain Forest Industry Association of Coeur D'Alene, Idaho; and Mr. Tony Colter, senior resources manager at Louisiana Pacific in Deer Lodge, Montana.

Chief, do you mind staying for a short while in case there are questions?

Mr. **Leonard**. I will be glad to.

Senator **Baucus**. Thank you very much. I appreciate that.

Jim, we are happy to have you here. Go ahead.

STATEMENT OF JAMES S. RILEY, EXECUTIVE VICE PRESIDENT, INTERMOUNTAIN FOREST INDUSTRY ASSOCIATION, IDAHO FOREST INDUSTRY COUNCIL, COEUR D'ALENE, ID; ACCOMPANIED BY MARK E. REY, VICE PRESIDENT, PUBLIC TIMBER COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, WASHINGTON, DC

Mr. **Riley**. Thank you, Senator.

I am Jim Riley. With me today is Mr. Mark Rey, with the National Forest Products Association, in the event that some questions arise from a broader perspective than our association represents. He might lend some insight to that.

GROWING TIMBER SUPPLY CRISIS

It has been discussed quite well here today that the past 2 years has brought a growing timber supply crisis to Montana and surrounding States, a problem which I believe you are well aware of from your recent trips back home.

The Forest Service timber sale programs have been severely curtailed, in some cases on some national forests completely stopped. Consequently, timber shortages have forced several sawmills in Montana and adjacent States to close, either temporarily or permanently. These closures have caused industry workers to be laid off, and are resulting in some cases, which you are aware of, in severe economic hardship throughout forest industry-dependent communities.

HEARING IS VERY TIMELY AND EXTREMELY IMPORTANT

This hearing today is very timely and, in my view, extremely important. The crisis in Montana is of huge and growing proportions.

TESTIMONY OF GAO AND FOREST SERVICE IS DISTURBING

It is disturbing to me to listen to both the GAO and the Forest Service earlier today and hear them both say that there is little solution that they see on the horizon with the exception of a period of hiatus, if you will, when the employees of our industry are going to be without work and without sustenance while the Forest Service and the other powers-that-be struggle to figure out how to make the process, which is clearly broken, work.

PROBLEM OF BREAKDOWN IN PUBLIC POLICYMAKING

As my statement spells out, I don't view this simply as being a little narrow appeals problem, as some might. I view the problem that is before Congress today as a much more substantial problem, one in which there is a breakdown in the public policymaking process for Federal lands. Although I also expect that some may disagree as to the extent of the problem that exists, I think we can just demonstrate conclusively today, particularly from some of the evidence in my testimony, that the problem is severe and the evidence is indisputable. Mills are closed today. People are without jobs.

EXTENT OF THE TIMBER SUPPLY CRISIS

Let me speak briefly, though, to the extent of the timber supply crisis. Since 1986 the harvest of national forest timber has exceeded its new sales levels for each year, resulting in drastic declines in inventory of uncut volume under contract. At the end of 1988, inventories of uncut volume under contract in Montana had dropped to a perilous low of only 19 months of annual harvest. Preliminary data we have for 1989 shows that this trend continues to grow. The volume under contract are now at, or less than, 1 year.

TIMBER PROGRAMS FOR THE PAST 3 YEARS HAVE FALLEN FAR SHORT OF THE PROGRAM LEVELS

Most disturbing to us is the startling observation that the Forest Service timber programs for the past 3 years have fallen far short of the program levels established by the new national forest management plans.

In region 1, forest plan timber sale accomplishment, by our analysis, is less than 75 percent of the annualized allowable sale quantity established in these plans. These regional averages actually mask in many cases the severity of the timber program shortages on individual forests. The Beaverhead, the Bitterroot and the Gallatin National Forests, which have been referenced today, show allowable sale quantities of only 39, 37 and 14 percent, respectively.

As a result, as has also been referenced earlier, sawmill facilities in Dillon, Darby, and Livingston, Montana, have been curtailed or in some places closed either permanently or temporarily, hoping for a solution to this problem.

INABILITY OF THE FOREST SERVICE TO DELIVER ON THE TIMBER PROGRAM OBLIGATIONS

The inability of the Forest Service to deliver on the timber program obligations set forth in the long, complicated and, in many cases, very contentious forest planning process is a problem of very serious proportions, in my view. My members in States such as Montana have some deep-seated feelings, which I am sure you were in touch with in your recent trip to Eureka, of just basic unfairness. They wrestled with the forest planning process, they participated as an informed and concerned public, they helped reach compromises that are embraced in those forest plans in many cases, and now find that actions, which they had very little ability to enter into, prohibit the Forest Service from implementing the policy choices made by those plans.

In fact, I think if I was going to summarize many of their views, they feel as though they have been sentenced to a very severe penalty without having had the opportunity to even stand trial for the crimes of which they are being accused.

A LOT OF NUMBERS THAT SEEM TO FLOAT AROUND

There are a lot of numbers that seem to float around. I don't take too much issue with what the GAO has summarized as being the number of appeals and the amount that those appeals have been delayed, timber sale activities in the region. You can always make the percentages look higher or lower depending on what you look at. By our numbers, there are approximately 100 million board feet of sales in the Montana portion of region 1 which have been delayed due to appeals and litigation which would otherwise have been advertised.

Even though the GAO's number now appears to be 16 percent, if I understood that correctly, the 100 million board feet in the State of Montana is much more substantial, in the neighborhood of 20 or 25 percent.

APPEALS PROBLEM

The appeals problem is caused, in our view, because existing procedures are heavily biased in the favor of obstruction and endless delay. The process serves those very well whose interests are to ensure that the forest plans are not implemented, but offers very little, if anything, to those of us whose interests depend upon the Forest Service fully implementing the management decisions called for in their plans.

We analyzed last year the Forest Service appeals system in their February proposal for revision of that appeals system. I won't go into other detail of what our analysis was, but I would say that we believe that the February revisions were a step in the right direction. But we are extremely disappointed that the extent of the changes embraced by the Forest Service weren't more comprehensive and, in our view, stand a very small probability of rectifying the problems we have in the State.

INAPPROPRIATE TO SEPARATE THE APPEALS PROBLEM AND LITIGATION PROBLEM

Let me also say, as explained in my testimony, that it is inappropriate to separate, in my mind, what is known as the appeals problem and what is becoming known as the litigation problem.

The litigation problem which we have on the Yaak, which was mentioned in testimony earlier today, which is motivating a considerable amount of effort on the Flathead National Forest and which is also present on several individual timber sales on the Beaverhead National Forest, is simply an overmature appeals problem, in my view.

As you are aware, appeals are a prerequisite to filing litigation. The litigation that subsequently follows along is of the same nature and causes the same problems.

SOLUTION

In my testimony I identify what I believe the solution should be to this. I think that, as one views the overall nature of the Forest Service public policymaking process, including the opportunities for dispute resolution, either appeals or litigation, what you find is that the wide variety of laws which the Forest Service is asked to comply with when making public policy decisions are primarily procedural and require the agency to go through certain procedural steps to arrive at a decision.

Because of these procedural requirements, it is always easy from the outside to argue that the Forest Service has not undertaken the correct scope or procedures necessary to culminate in the decision that they advance in any document. Subsequently, you can always argue that more procedures are needed, new data comes to the table, the analysis is too broad in scope or too little in scope, and ask as a result of an appeal or litigation that additional procedures be conducted before the project or the timber sale goes forward.

The charge before Congress today, I believe, will have to be to step in and say at some point in time enough is enough. And I take a small degree of encouragement that you seem to be supported by some views in the Supreme Court which ruled just last week, or the week before, on the project on the Elk Creek Dam which posed somewhat the same question.

We, however, simply put, can't afford to wait several more months or possibly years while we wrestle with this question. People are out of work today. More people will be out of work months from now.

In our efforts to keep everybody maintaining the status quo, we have recommended that Congress consider in the very near future embracing legislation which would ratify the decisions and the policy statements reached in the national forest plans completed for Western States.

And furthermore, Congress should establish a revised dispute resolution system if you will, which would still allow disputes to be continued if there are questions about whether the Forest Service is conducting their actions in accordance with those public policy decisions but would not permit the endless extension of process, if you will, which we see from the current use of appeals and litigation.

I offer those comments as an overview. I would be happy to answer any questions. I leave once again with the urging that it is time that we act quickly to solve this problem because we are simply out of time in the State of Montana and the adjacent States in the West.

[The prepared statement and attachments of Mr. Riley appear at the conclusion of the hearing.]

Senator BAUCUS. Thank you very much, Jim.

Tony, you are next.

STATEMENT OF ANTHONY COLTER, SENIOR RESOURCE MANAGER, LOUISIANA PACIFIC CORPORATION, DEER LODGE, MT

Mr. COLTER. Thank you, Senator. I am Tony Colter, senior resource manager for Louisiana Pacific Corporation in Deer Lodge, Montana.

THE APPEAL AND LITIGATION OF TIMBER SALES ARE CAUSING A SEVERE RESTRICTION IN TIMBER SUPPLIES

Our ability to secure necessary resources for all of our Montana facilities has been substantially encumbered during the past several years by the growing number of appeals and legal disputes. In the Deer Lodge market area, approximately 42 million board feet of timber has been delayed from advertisement during the last 2 years due to appeals and sales voluntarily withdrawn by the Forest Service due to appeal threats. This is enough timber to run our Deer Lodge sawmill for 1 year.

The impact of unresolved disputes on our Libby sawmill is even more distressing. We depend almost entirely on the purchase of national forest timber from the Kootenai National Forest in northwestern Montana to sustain this facility. In 1988, the Kootenai Forest sold only 179 million board feet of the planned 241 million board feet timber program. The nearly 60 million board feet shortfall on the Kootenai National Forest is the direct result of an injunction issued by the Ninth Circuit Court of Appeals in July of 1988.

The root of this entire matter was a Forest Service decision reached in the early 1980's to reconstruct a portion of the road network in the Yaak drainage of the Kootenai Forest. The court found that the Forest Service had failed in the Yaak environmental analysis (EA) to take a broad enough look at the cumulative effects of the road construction decision and timber sales and other activities which would subsequently be served by the road.

In the interim, 60 million board feet of the Kootenai Forest's planned timber program is under injunction until the dispute is resolved. Even more distressing is the fact that several million board feet of insect-damaged timber is deteriorating beyond the point of commercial harvest in the Yaak, since the injunction has stopped salvage efforts.

I hope this subcommittee can appreciate how bitter some of us have became when we recognize that several hundred of our jobs are immediately in jeopardy while timber rots in the woods due to an alleged dispute over a road which has already been built.

A RECENT SETTLEMENT AGREEMENT ON THE DEERLODGE PROVIDES A GLIMMER OF HOPE

In spite of this bad news, there have also been some glimmers of hope that reasonableness can prevail. Recently, a formal Settlement Agreement was signed by several appellants of the Deerlodge Forest plan. I am pleased to have been a part of the discussions which led to this settlement.

The agreement calls for the Forest Service to develop an amendment to the Deerlodge Forest plan which examines specific ways to provide improved wildlife habitat and hunting opportunities for big game, while simultaneously evaluating ways to increase timber program levels. I believe, as do the others who participated in the discussions, that we have identified reasonable proposals for the Forest Service to accomplish both objectives.

As a result of this effort, all parties to the agreement will withdraw their appeals of the Deerlodge Forest plan. Furthermore, we have all agreed to meet again if further disputes arise.

In understanding this success, it is necessary to recognize that several conditions which allowed the agreement to be reached. First, I believe everyone who came to these discussions felt they had something to gain and something to lose.

Second, the ecology of the Deerlodge National Forest made it possible for everyone to emerge a winner. There were enough potential timber harvest opportunities and wildlife habitat opportunities on the forest so that both our interests could be met.

Third, we were able to overcome the hurdle of defining environmental objectives as something more meaningful than "less roads and less timber harvest" Thus, we were able to progress with meaningful discussions on how to harvest timber in a manner which better meets other objectives, rather than simply push-and-shove on the question of whether to cut timber at all.

Fourth, and possibly most importantly, we had the luxury to spend the time necessary to learn each other's point of view, and consequently to develop a level of trust and respect for each other's position.

Although I believe we have made significant progress, it would be naive to think that this agreement has settled the appeals problem on the Deerlodge. The most evident shortcoming is that it does not bind individuals or organizations who are not party to this agreement. We have already received word that some preservation organizations are preparing to appeal the agreement.

NEGOTIATIONS ON OTHER FORESTS MAY BE DIFFICULT

Now that the Deerlodge discussions are complete, I am asked frequently about the possibility of using similar negotiations to solve disputes on other national forests. I always respond by first reviewing the four elements previously cited which I believe were necessary for our success on the Deerlodge.

It has also occurred to me that the opportunity for reaching mutually agreeable solutions is significantly reduced if the forest industry is asked to negotiate under duress.

Specifically, I do not believe productive negotiations are possible when significant portions of vital timber programs are being withheld due to appeals or injunctions. Those conditions are equivalent to negotiating with terrorists who have planted a bomb on an airplane. The circumstances are so unjust that it will simply not be possible to develop the trust necessary to productively discuss possible solutions.

I appreciate the opportunity to testify here.

[The prepared statement of Mr. Colter appears at the conclusion of the hearing.]

Senator BAUCUS. Thank you very much, Tony.

Do you basically agree with the GAO that a large portion of the timber supply shortage is because of the Forest Service's failure to live up to standards as applied by the Ninth Circuit Court of Appeals?

Mr. RILEY. Let me try to answer that question this way, if I might, Senator. First off, I do not dispute the GAO's numbers and the analysis they used to arrive at those numbers. I do, however, have a great deal of concern, as we toss around on the table the terms frivolous and meritorious, as to what that really means.

Senator BAUCUS. I wondered about that.

Mr. RILEY. For example, I think the most clear case that we know about, as you said earlier, the Yaak EIS which is due out today. Apparently, according to the GAO's analysis, all of the delays that have occurred because of the Yaak injunction are meritorious, or delays with merit.

Presumably, the Yaak EIS, which is due out today, will authorize some portion, if not all, of the delayed sales to go forward. Now, does that mean that the injunction that has caused the hardship in Libby and Eureka has been meritorious or not, or frivolous or not? I don't know how to respond to that.

What is clear to me is that if the sales are subsequently authorized and the initial decision to conduct the activity is not overturned in spite of a finding of a procedural inadequacy, then there is some question as to meritoriousness or frivolousness, if you will.

Senator Baucus. Well, I think we have to get our terms straight here. If frivolous is something that is not based on merit, I think it is fair to say that as determined by the ninth circuit, that the *Yaak* appeal was not a frivolous appeal because the ninth circuit found that according to the law, under NEPA, that the merits, the appeal was meritorious.

Mr. Riley. Well, I think that leads to the broader question. You know, we have, since NEPA was passed in 1969 if I remember correctly, we now have nearly two decades of case law that is pretty articulate about what not to do, about how it can't be done. You know, the courts have fairly routinely—I am not an attorney—but routinely inform the Forest Service that they didn't do it right, but we don't have very many examples of where it was done right.

So it has led many of us to conclude that maybe what we have before us is a series of procedural requirements that there is always a violation to, and anybody who is an astute enough attorney with enough schooling in these matters can find those procedural seams, if you will, and call it into question. Whether that is meritorious or frivolous, I would again simply retreat to the ground to say that it is questionably in the public's interest to allow continual extension of process to avoid culmination of a decision, in our view.

Senator Baucus. Basically, I heard GAO give four basic reasons for the timber supply problem. One is appeals based, in their terms, on merit. Second, is inadequate funds and personnel. Third, fires. Fourth, the lack of a wilderness bill.

I heard them give those as the basic four reasons for the timber supply shortage in the State of Montana. Do you agree or disagree on this?

Mr. Riley. Let me take them one at a time. As far as additional financing and personnel, for whatever reason it came about, we concur with the Forest Service analysis that the timber pipeline, their preparation pipeline, is terribly empty right now and it is going to be extremely difficult to get that refilled.

Senator Baucus. Right.

Mr. Riley. So there is a need for additional personnel and resources to get that program back on track.

I would be remiss if I didn't say, though, that the amount of money that it takes for the Forest Service to execute this job seems to be far in excess of anything that the private companies that we represent incurred to take care of the same job on their own ground, in the neighborhood of 8 and 10 times. And I think that there probably is a legitimate question before Congress as to maybe we are requiring the agency to do something——

Senator Baucus. Not sufficient.

Mr. Riley. Yes, that that really is not worth the money. But the money is necessary but not sufficient, if you will, to help out.

Senator Baucus. Right.

Mr. Riley. The third issue was—help me here.

Senator Baucus. Fires.

Mr. Riley. Fires. There is no question, and we have spent a great deal of time with the Forest Service and concur with their priority-setting mechanism. When a fire strikes, you have to do what you have to do to put it out. There is no question about that.

But the 2 years running in a row now where people have been diverted to fight fires has been the principal cause in region 1 of the reduction in the timber sale pipeline. And if Congress has some way to ensure there will be no forest fires this summer, that would be great. But in light of that, I think all we can do is make sure contingency funding is available for the Forest Service as they go forward.

Senator BAUCUS. What about the need for a wilderness bill?

Mr. RILEY. Let me say this this way. [Laughter.]

Senator BAUCUS. Be careful here. [Laughter.]

Mr. RILEY. The designation of additional areas——

Senator BAUCUS. You can always say so. The Forest Service says so. Doesn't it sound imminently obvious? [Laughter.]

Mr. RILEY. Well, I don't know if that's fair. But I am certainly curious of the GAO's assessment. I didn't see it in my brief review of their testimony as to how many of the delayed timber sales that they have identified, the volume that was delayed do they believe could have gone forward had the Montana wilderness bill been enacted last year.

Senator BAUCUS. Well, as I understand it, in some other States the delays caused by appeals on grounds other than NEPA, the Endangered Species Act, for example.

Mr. COLTER. That's right.

Mr. RILEY. There's very little question about that. The Yaak, which is a very big problem, has nothing to do with the roadless character of the land. The Flathead litigation also has nothing.

But I do want to say this industry——

Senator BAUCUS. Would it help, that is just the question? Help or hurt?

Mr. RILEY. This industry recognizes the longstanding discussion and unresolved question about designation of additional lands for wilderness in the State of Montana. The designation of those lands will not help. Now, the enactment of legislation that might include, in addition to the designation of some lands as wilderness, sections of the legislation which would help resolve the timber supply crisis and the reasons that have brought that about would be a help in the State of Montana.

Senator BAUCUS. That portion which releases does help.

Mr. REY. If I could just comment nationally on how that has played out in other areas, in other States where there are wilderness bills, the situation, for instance, in Oregon and Washington, as well as portions of the Southeast where there are wilderness bills and equal amounts of conflict over Forest Service management decisions, is not dissimilar.

That is to say there are substantial disruptions in the timber sale program even though the issues raised in administrative appeals or litigation might be slightly different.

I think the way I would characterize the passage of a wilderness bill like the ones that have passed so far is that it is a necessary component, but probably not by itself sufficient, to resolve the conflict that we're seeing now and the disruption we're seeing.

Senator BAUCUS. Absolutely. I think it's helpful, but it's not sufficient. No doubt about that.

Tony, first of all I want to commend your efforts in the Deerlodge in trying to get parties together to negotiate. That goes a long way, and I think it is part of the solution here. Parties will tend to negotiate if they are forced to negotiate, in the sense that otherwise it's going to be a judicially imposed solution and maybe even a legislatively imposed solution.

Can you give me some advice as to how we can encourage more negotiations in other forests, like the Flathead where we are now trying to find agreement on a forest plan?

Mr. **Colter**. Well, I think the four points I mentioned in my testimony, at least as far as the industry is concerned, are vital to the negotiations, in addition to this problem of negotiating under duress, being put into the possible situation where we have to. It's not on equal footing.

Senator **Baucus**. You also mentioned that even though you reached agreement, you have heard that some group outside of the negotiations, might nevertheless appeal to the Forest Service. Is this the Deerlodge Forest plan that you were discussing?

Mr. **Colter**. Right.

Senator **Baucus**. That is a worry and concern.

If the Forest Service has agreed with all the parties, I am wondering if a court would take judicial notice of that and not be as likely to grant an appeal as it might if there were no negotiations?

Further than that, I suppose Congress can always pass an amendment saying, this is it. This would lock in the negotiated agreement and make it more difficult for a party not part of the agreement to appeal, if granted an invitation to participate in the negotiations.

Mr. **Colter**. No, I don't know how a court would or could interpret a negotiated agreement. You know, the problem now is they are interpreting the laws rather than the decisions in the forest plans and why and how those decisions were arrived at.

The one big concern I have with the negotiation process is it's a whole new process. Why do we need it? You know, we have a forest planning process which takes into consideration all the public comment, and now we need a negotiation process on top of it. And there is the hazard of not including everybody in that is affected by the decisions in that process. And I am not saying that we aren't willing to do it and that it won't work, it's just that you have to wonder why we need it.

Senator **Baucus**. I have a question on the appeals reform. You heard the Forest Service say that probably the new administrative appeal reforms will have some effect, but not a lot as a practical matter.

Jim, you made the same point. You wished that they had gone further.

What other changes in appeals do any of the three of you recommend?

Mr. **Riley**. I think part of the real problem we have before us is the question of stays, stays and injunctions in the court case. It is routine for the Forest Service, as George Leonard explained, to stop everything when an appeal is filed and while that appeal is being disputed, regardless of what the impacts are to any affected parties that might have a vested interest in seeing the program go forward.

That is what has caused, to a large extent, the enormous feeling of inequity amongst our interest in the State. The folks who are currently out of work on the Beaverhead National Forest in Dillon, Montana, find that it is not because there was a public policy decision that put them out of work but because of the hiatus that the Forest Service planning timber sale decisions were placed in while the appeals and litigation were going forward has now foregone any interest and their ability to protect their interests at all.

I think that, as I understand it, there are certain requirements that the Federal courts have for balancing harm, to demonstrate likelihood success on the merits of the case and so forth.

Senator BAUCUS. Didn't the Forest Service say they do make that balance? Do you think they do not, or what?

Mr. RILEY. Well, with all due respect to George, I think the Forest Service tries very hard not to make those choices. It's much easier to avoid that question rather than to grapple with it head on.

We have never seen—I mean how can you possibly—I get carried away with these things—I can't imagine that you can shut down the entire timber sale program on the Beaverhead and the Gallatin National Forests every sale, essentially, and not find one with a balance of harm tipped in favor of the people whose jobs were at stake. You know, when you look at the case, it's hard for me to conclude that that is happening.

Mr. REY. On that issue, I think that the Forest Service's approach to granting administrative stays is a reflection of the way the courts have granted judicial injunctions, either temporary restraining orders or preliminary injunctions.

And particularly recently we have seen courts err very heavily on the side of stopping activities, in many cases without making a very sharp distinction between the impact or the balance of harms in stopping the particular timber sale or stopping the whole timber sale program in a region.

Senator BAUCUS. That is an interesting point. As I recall the common law, anyone who seeks an injunction has to show that failure to grant the injunction would cause irreparable harm. Are you saying that standard is not being observed when stays or injunctive relief are being considered?

Mr. REY. I think that that standard has over the course of 20 years of environmental litigation, primarily under NEPA but under a variety of other statutes, gradually moved toward an overriding assumption that the activity should be stopped unless there is some extraordinary circumstance which would allow what used to be a more typical balancing of harms.

And that may be something that ultimately Congress will have to evaluate because Congress always has had the responsibility and the authority to set the limits of Federal equity jurisdiction and has in other contexts over the course of history, particularly in labor law, for instance, interceded when it was apparent that the courts over a prolonged period of time were exhibiting a consistent pattern of behavior that favored one side of a debate in the decision to grant injunctive remedies.

And I think that is where we are right now.

Senator Baucus. Does the *Elk Creek Dam* decision bear on this at all?

Mr. Rey. Not really. Elk Creek Dam will have other important ramifications on how the ninth circuit interprets NEPA. Earlier you asked how the Forest Service could have such a rotten record with NEPA compliance before the ninth circuit. You could equally ask how the ninth circuit could have such a rotten record on similar cases with the Supreme Court because the Supreme Court has generally been overturning the circuit, although the circuit has so far seemed impervious to direction by the Supreme Court as to how it ought to apply NEPA law.

Senator Baucus. Could you clarify that please? What are you getting at?

Mr. Rey. What I am getting at is the ninth circuit has historically applied a different standard for reviewing the adequacy of agency decisions under NEPA than the other circuits have.

And one of the important elements of the *Elk Creek* case is the Supreme Court said in case you hadn't figured this out by now based on our previous rulings, you're supposed to be reviewing NEPA compliance decisions on the basis of whether the agency was arbitrary and capricious.

Senator Baucus. Would you say that some of these shortage problems do not occur at Southern national forests?

Mr. Rey. They occur, but generally not for the same reason. Usually it's an element of a different area of law. The application of a different area of law.

In the South, for instance, the current conflict there is more an Endangered Species Act, National Forest Management Act set of issues that is working its way up and is now before the fifth circuit.

Senator Baucus. But do those actions have the same consequences even though they're under the Endangered Species Act and National Forest Management Act rather than NEPA?

Mr. Rey. If the consequence we're speaking of is stopping timber sales, yes.

Senator Baucus. So all circuits, as they apply the environmental laws, have similar results even though they're applying different statutes?

Mr. Rey. In terms of the issuance of injunctive remedies, that's correct.

Senator Baucus. I see.

Mr. Riley. Which is where we started and then we digressed.

Senator Baucus. OK.

Mr. Riley. Before we leave that point, if I might.

Senator Baucus. Sure.

Mr. Riley. Senator, I think the most telling example is that irreparable harm, to me, I think, is easily demonstrable in Dillon, Montana, where people's jobs have been lost and very soon will be permanently lost. It's clear today. There is no way under the current Forest Service appeals system to ask for a stay of the activities that cause that irreparable harm to occur. You can't compel, you can't appeal a decision by a Forest supervisor not to offer a timber sale. That is viewed as not being an appealable decision. That is an example, and I can't tell you from the legal perspective how to solve that, but that is an example of the inequities that exist in the entire system.

Senator BAUCUS. Well, how do you basically reform the appeals process and yet still retain the basic right of an average American citizen to his day in court? How do you resolve that?

Mr. RILEY. I have one other suggestion in that vein.

Senator BAUCUS. You heard the Forest Service say that they felt it was improper to require bonding of appellants because that would deny equal access to the courts to groups that were not members of large organizations and didn't have the funds.

Mr. RILEY. Well, if we look carefully at the criterion for stays, for issuance of stays, and particularly the responsibility to balance harms, to demonstrate likelihood of success on the merits and some of those things, that would tighten up the conditions under which that occurred and then supplemented that with what I think clearly is needed, a very stringent requirement that if a stay is issued on a project that somebody's interest would be damaged if it did not go forward, that there is a very tight, nonnegotiable timeframe on all parties, including the Forest Service, as to how the appeal must proceed to reach conclusion thereafter.

The appeals regulations, as written now, allow all kinds of extensions of time regardless if a stay is in place and then the Forest Service can grant themselves whatever time they deem necessary.

Senator BAUCUS. Let's assume there is a limit on time. What would be the sanction be if the Forest Service goes beyond the time?

Mr. RILEY. It's within the realm of what's before us now. If the Forest Service goes beyond the time, our recommendation would then be that the decision is assumed to be affirmed, giving the appellants then an opportunity to go before the Federal court if they would like, to pursue remedy. But it does move the process along. It doesn't trap it.

Mr. REY. There are two other recommendations that we made that we will submit for the record, that in the current context of the forest planning process make a lot of sense to us:

First, where we have a final forest plan where all appeals have been heard and resolved and the plan is a living document that should guide the management of the National Forest System or the management of that national forest unit, then subsequent appeals on activities should be limited to the question of whether or not the activity is consistent with the plan. If it is, the activity should be upheld under appeal. If it's not, it should be reversed.

Senator BAUCUS. The problem with that, though, is that those individual actions tend to be site-specific actions and the plans tend to be goals or general guidelines. There really is a difference between general guidelines of a plan and site-specific application, say, to a particular sale. So they're not the same really, as is sometimes explained to me.

Mr. REY. That's correct. And what you would be looking at is the site-specific analysis done to justify this activity, demonstrate that the activity fits within the standards and guidelines of the plan and management prescriptions, the restrictions on clear-cut size, the proscription on working in sensitive areas and that sort of thing.

I think a second change that would make some sense is to limit standing to parties who were participants in the forest plan debate in terms of the issues that they can raise subsequently.

Senator **Baucus**. I have a lot of sympathy for that.

Mr. **Rey**. Right now, for instance, we are involved in an ongoing debate with the Forest Service and the Sierra Club Legal Defense Fund in the Southeast where the Sierra Club Legal Defense Fund wants the Forest Service to do differently than what is in its final plan land management prescriptions within a certain distance of red-cockaded woodpecker colony sites, that that is an endangered species. But on the majority, all except one, of the national forests, the final plans are done.

Senator **Baucus**. That may be—I wonder to just what degree that goes to frivolous appeals. In their testimony the GAO has said that the appeals they reviewed always had merit.

Second, if there were a limit on standing, as you are suggesting, I can see every organization under the sun just getting in and filing something so they can qualify for standing later. I don't know if that is really going to solve the problem.

Mr. **Rey**. It might help. It would be hard to know for sure.

Senator **Baucus**. Thank you very much. We appreciate your testimony.

Let's have our next panel, please. There is a vote going on. Let's see what we can do. Mr. Mike Anderson and Mr. Tony Schoonen. Michael Anderson is a forest planning specialist with the Wilderness Society here in Washington. And Mr. Tony Schoonen is with the Montana Wildlife Federation, from Bozeman, Montana.

We are under a time constraint here. I am afraid we are going to have to recess and then come back. Why don't you give your statements, and we will go as far as we can before coming back.

Mike, you're first.

STATEMENT OF H. MICHAEL ANDERSON, FOREST PLANNING SPECIALIST, THE WILDERNESS SOCIETY, WASHINGTON, DC; ACCOMPANIED BY JAY WATSON, DIRECTOR, NATIONAL FOREST ACTION CENTER

Mr. **Anderson**. I would be happy to simply submit my prepared statement for the record and address some of the points that you have discussed earlier in the hearing.

Senator **Baucus**. I have a note here we have 30 minutes. So we are in good shape.

Mr. **Anderson**. I would like to submit for the record a critique of the Montana Department of Commerce's study called "Critique of the Southwest Montana Mill Crisis," which raised issues concerning timber supply around the Beaverhead and Gallatin National Forests.

NEGOTIATIONS, THE WILDERNESS BILL, FUNDING FOR THE FOREST SERVICE AND RESPONSE TO GAO FINDINGS

I thought I would address some of the points that you raised initially in the hearing, Senator Baucus, concerning negotiations, the wilderness bill, funding for the Forest Service, and also the issue that has arisen during this hearing principally in response to the

GAO findings, which is the problems the Forest Service is having in complying with NEPA in its timber sale analysis.

NEGOTIATIONS

First of all, with respect to negotiations, the Wilderness Society and other conservation groups are open to negotiations on forest plans, timber sale appeals, and lawsuits.

We have had many successful settlements of forest plan appeals around the country. They are not always successful, but we have generally felt that it has been worth giving it a try. And it very much varies from situation to situation as to whether it will be successful.

I would note, however, that there is a problem with negotiations concerning lengthy delays that negotiations can cause, and if we are interested in resolving appeals rapidly, there is a major tradeoff if we go heavily into the negotiation route.

WILDERNESS BILL

Second, with respect to the wilderness bill, I would take issue with the timber industry's statement that there has been substantial problems with respect to timber sales planned in roadless areas in States that have release language through wilderness legislation.

A Forest Service study that was completed in 1987 on States that did have release language found that 94 percent of all the timber sales within released roadless areas were not appealed at all and that in fact the standard release language within those wilderness bills had been effective, for the most part, in resolving roadless area controversies.

Senator BAUCUS. Now, what explains the difference of opinion on that point? I hear both sides, and I am just curious as to why the difference.

Mr. ANDERSON. Well, there is ongoing controversy in States that do have wilderness bills. It's not necessarily centered around wilderness areas, though. For instance, in the Pacific Northwest, in the last couple of years the issue of ancient forest liquidation has become an enormous controversy and has culminated just in the last few months with a series of court decisions over northern spotted owl habitat and, in addition, the Fish and Wildlife Service's determination that the owl warrants listing as a threatened species.

Senator BAUCUS. Release language does not insulate Forest Service action from the Endangered Species Act.

Mr. ANDERSON. And spotted owls don't all live in roadless areas. In fact, most of them do not live in roadless areas. And really the issues are quite separate. Similarly, in the Southeast, where we have many released roadless areas there is a huge controversy with respect to clear-cutting, particularly in the southern Appalachian national forests.

Plus there is a great controversy concerning the red-cockaded woodpecker, as was earlier discussed. And again those are issues that are quite independent of the roadless area controversy.

However, with respect to roadless areas, the Forest Service's problems with respect to complying with the *California* vs. *Block* ninth circuit decision of 1982 have been essentially removed in those States where release language has been enacted.

CONCERNING ADDITIONAL FUNDING FOR THE FOREST SERVICE TO PREPARE TIMBER SALES AND DO BETTER ENVIRONMENTAL ANALYSIS

Concerning additional funding for the Forest Service to prepare timber sales and do better environmental analysis, I would say that we would be concerned about adding still more money into the Forest Service's timber program where we think that there is already a huge imbalance in the Forest Service's management budget between the timber program and all the other resources and uses of the national forests.

We would suggest that if there is going to be money, additional money allocated for sale preparation, that the fair way to do it is to take the money from other portions of the timber sale program, specifically the road program. We think that there is as much as $100 million of the Forest Service's budget that is being devoted to timber sale roads which is really a waste of taxpayer funds. And that could be, I think, diverted to sale preparation.

[The prepared statement and Critique of the Southwest Montana Mill Crisis of Mr. Anderson appear at the conclusion of the hearing.]

Senator **Baucus**. I think I will break here.

I think we were misinformed. I think it's a 15-minute, not a 30-minute vote. Why don't you go ahead, Tony. We are finding out right now.

STATEMENT OF TONY E. SCHOONEN, MONTANA WILDLIFE FEDERATION, BOZEMAN, MT

Mr. **Schoonen**. Thank you, Senator. There are just a couple of points that I would like to mention here.

TIME AND EFFORT IN NEGOTIATIONS

You were talking about the time. On the Deerlodge negotiations, I was party to that. I was representing three different organizations. It took 14 months and over 25 meetings. And this is all volunteer work on my part.

Senator **Baucus**. Fourteen months and 25 meetings!

Mr. **Schoonen**. So I mean it does take time.

Senator **Baucus**. It takes a lot of effort.

Mr. **Schoonen**. And I think that I can honestly say that without appealing, having an administrative appeal filed, that I don't think those groups would have come to the table. And I am glad that the GAO and the Forest Service both said that the appeals process was working because I know that those negotiations wouldn't have come about without that administrative appeal.

FOREST SERVICE BUDGET

The other thing that I would like to emphasize is that when we're talking about the Forest Service budget, they mentioned that there was a cut in funding. I would like to see some of this spent on recreation and wildlife biologists and water quality hydrologists. But I think they are sincerely lacking because when it comes down, like on the forests, the Beaverhead for example, I have worked with that group on through negotiations for over 12 years, and what happens is they have a terrific turnover, terrifically high turnover in their staff. You can't really find qualified people to talk about the issue that really know the wildlife and fisheries resource.

CLOSER COOPERATION WITH THE STATE AGENCIES

An other suggestion that I would make is that I would like to see closer cooperation with the State agencies such as the Department of Fish and Wildlife. They know all the background of all the wildlife, fisheries. They have people right there that can do it. But unfortunately until just very recently there has been a pulling apart of those agencies and not the working together that there should be.

So those are the suggestions I would like to make just now.

[The prepared statement and attachments of Mr. Schoonen appear at the conclusion of the hearing.]

Senator BAUCUS. Let me ask a single question first. Do you think there is a timber supply shortage problem in region 1, either one of you? The GAO figures point out the decline and how much has been delayed because of appeals.

Mr. SCHOONEN. I personally feel that the timber targets for southwestern Montana are too high. And I realize that they are set by Congress. What happens, they are not taking into consideration the other resource values of the forest.

For example, there are 1,200 guides and outfitters throughout Montana, and their families, that depend on the wise management of the forest resources also. And there are just a lot of those considerations that aren't taken into account.

And the Beaverhead, I think, has just been a very poorly handled, very poorly managed process right down through the 12 years that I have dealt with them.

Senator BAUCUS. I am afraid I am going to have to recess now. I have to get to the floor in 5 minutes.

We will recess for about 10 minutes.

Thank you.

[Recess.]

Senator BAUCUS. The hearing will come to order.

I appreciate the indulgence of the witnesses, and I apologize for the delay.

I was asking about timber supply shortages in region 1, and I think you, Tony, were suggesting that perhaps there is not.

Mr. SCHOONEN. Oh, no.

Senator BAUCUS. Please amplify on that.

Mr. SCHOONEN. I want to maybe clarify that. There is a timber supply problem. But you know, there are several things that led up to it. The timber people overcut their own private timberlands too rapidly. And therefore they are looking to Uncle Sam to fill in the void. And unfortunately—well, fortunately, on our public lands there are certainly certain guidelines that they have to follow that they didn't have to follow on theirs.

Senator **Baucus**. But what if the Forest Service had met all of the requirements of the ninth circuit under NEPA and therefore the EIS's or the EA's would have been judged sufficient so that in at least GAO's analysis the plan sale targets would have been met? Under this hypothetical situation the Forest Service had bulletproof EIS's and sold an additional 110 million board feet of timber. Would that be fine with you?

Mr. **Schoonen**. I would say not.

Senator **Baucus**. Why is that? All the requirements for the EIS's are met.

Mr. **Schoonen**. Senator, I feel that until the wilderness issue is resolved, there are certain 4 million acres of roadless area that I feel plays an important part of that.

Senator **Baucus**. But isn't that a second component of the problem? That is, as I understand the GAO—and I guess I would like to ask whether you agree with the GAO—essentially GAO concluded——

Mr. **Schoonen**. Yes.

Senator **Baucus** [continuing]. And the Forest Service tended to agree that first there is the problem of moving targets, if you will. The Ninth Circuit Court of Appeals is essentially saying, Forest Service, you botched it, go back and do it again. Consequently the Forest Service went back and is administratively thinking we don't want the ninth circuit to knock us down again, so let's go overboard and do all these other things.

So that's basically one reason why appeals generically have caused the timber supply shortage.

Forest fires are the second reason and the lack of a wilderness bill is third. The fourth reason is the cutback in personnel and dollars.

Do you tend to agree with those four reasons?

Mr. **Schoonen**. Right.

Senator **Baucus**. You do.

Mr. **Schoonen**. I do.

Senator **Baucus**. OK. Could you amplify on why you think passage of a wilderness bill will also help?

Mr. **Schoonen**. Well, like I said before, Senator, those 4 million acres of roadless lands, if the right criteria are followed, I mean I'm sure that if the appeals process stays in place, that some of those areas that are valuable for fish and wildlife and whatever could be appealed if the process wasn't followed.

Senator **Baucus**. Do we have the Forest Service still here?

I guess I could ask the question a bit differently. Mr. Leonard, have the cutbacks in personnel and funds for the Forest Service—I think you said since 1980 there is a 15-percent cut—was that across the board or was there more of a cutback for wildlife, watershed, and recreational values compared with timber harvest or not?

Mr. **Leonard**. It was not across the board. Generally our commodity programs fared better than the recreation, wildlife, and particularly programs like soil and water that don't have a vocal constituency out there speaking with them, have not done well during the period of budget constraints.

Senator **Baucus**. Did you therefore tend to agree that if resources are added back, that perhaps they should be added back even more to soil, water, and wildlife values?

Mr. **Leonard**. Well, recognizing that we support the President's budget as an appropriate step for this upcoming year, given the various budgetary problems of the country, if we had our druthers, we would like to have ample funding to carry out the forest plan in all its aspects: ample funding for the trails, the wildlife work, the recreation facilities, particularly for that basic stewardship job of soil and water protection, and for the commodity programs.

And we think that we would frankly reduce a lot of the controversy that has developed over the management of the forests if all the programs were being funded in a balanced form.

Senator **Baucus**. Thank you, Mr. Leonard. I appreciate that.

Now, what about the industry point that the Forest Service could be more efficient if you use the dollars more wisely. I know that is an old saw that you hear a lot. But I am just wondering what could be done about that instead of spilling more dollars into it because there are ways we can be more efficient?

Mr. **Leonard**. Certainly, if you take as an index the cost of managing timber on private land and then looking at the cost——

Senator **Baucus**. As was mentioned earlier.

Mr. **Leonard**. Right. And compare that to the cost of managing timber on Federal lands, it costs a lot more because we do things that the private land owners usually do.

Senator **Baucus**. You have a lot more considerations.

Mr. **Leonard**. Well, a lot more considerations, the NEPA considerations, the compliance with the other acts. And the fact that we frankly cut less volume per acre in our harvesting because of the dispersion to meet wildlife and watershed goals and things. So it does cost us a lot more.

During this period of budget constraint, we have substantially reduced the cost. For example, the cost of road construction on a per-mile basis, we have reduced those costs about 20 percent.

While on an annual basis the costs of preparing sales have increased on a constant-dollar basis, the amount of money we're spending for sale preparation is down substantially on a unit-cost basis.

I wouldn't want to argue that there is no slack at all, but I think we are doing a relatively efficient job of it.

Senator **Baucus**. Tony and Mike, you heard the industry representatives say that there is an unfair bias on stays in favor of the environment against jobs or the industry.

I would assume that you would not agree with that assessment.

I would like to discuss that point and maybe get to the heart of the matter a little more.

Mr. Leonard, when I asked the same question earlier, you said that you balance out the economic with the environmental.

Mr. **Leonard**. Well, I think we indicated that we did consider both, but there is a bias in favor of granting the stay. And you know, a large share of the appeals that we are dealing with are appeals over whether or not we are going to enter a roadless area. And that action to enter that roadless area, since the first thing you do under the timber sales is build a road, it's an irrevocable decision to change the character of that area. And if you look at what the courts have done, almost inevitably, as Mark Rey indicated, the courts, under NEPA, have frankly given the weight of the burden toward protecting the status quo in terms of the environment. And so we have tended to follow that lead.

Now there is a solution. And that is to push our decisions far enough in advance so that we can deal with the appeals, resolve them, and get them out of the way before the sale is scheduled.

Senator BAUCUS. Now how are you going to make that happen?

Mr. LEONARD. Well, that is this question of providing some resources and manpower to get on with advanced sale preparation. We would like to be in a position where we filed the decision notices a couple of years before the sale is scheduled, which lets the appeals process run, and where we would enter the fiscal year with all the work done on sales that we're going to sell that year completed. And that would allow a fair opportunity for appeals for people who are concerned about those activities, but it would also allow us to have some certainty to our ability to carry out the sale program that we contract to do.

Senator BAUCUS. Tony and Mike, what do you think about the industry suggestion to limit standing to those persons who were initially involved in the process who either, I suppose, had in fact participated in public hearings or filed comments? What is your reaction to that suggestion?

Mr. ANDERSON. Well, I think that with respect to forest plan appeals, virtually all the organizations or people who have filed appeals have also commented on the draft plans, with few exceptions.

With respect to timber sales, there is a big problem with that sort of a requirement because there currently is very little advance notification to the public when a timber sale is being analyzed and proposed. Ordinarily, the first time that members of the public will find out that a timber sale is going to be offered is when the Forest Service signs the decision notice and circulates the environmental assessment on that sale.

So there is really not very much opportunity under the current process where the Forest Service uses EA's to document timber sales, as opposed to EIS's where you have a draft and public comment.

Senator BAUCUS. I would like to ask all of you your reaction to industry's suggestion, that if the plan is approved, that any appeal on any project under the plan is presumed to be without merit so long as the project conforms with the plan.

Mr. LEONARD. Well, it would certainly make our life simpler. [Laughter.]

And there is some merit in the sense that if the plan has adequately considered the environmental impacts and the effects of particular sales on threatened and endangered species, that then anything that is carried on in accordance with that plan is likely to be in compliance with the environmental laws.

Senator BAUCUS. Do you agree with that suggestion?

Mr. LEONARD. Yes. I suspect, as I say, that it would make our life easier. I don't think it's probably politically viable, frankly.

Mr. ANDERSON. It would also be contrary to a number of the decisions from the Chief's office on forest plan appeals. For instance, the Flathead appeal and the Idaho Panhandle appeal, both in region 1, have both been saying that forest plans do not make site-specific decisions and that therefore a lot of the objections that are being raised in forest plan appeals are really premature and will be addressed at the project level; that is, the timber sale or other project level.

So we would be in a complete "catch-22" if on the one hand the Forest Service were to be telling us that it's premature to——

Senator **Baucus**. Yes, I hear you.

Mr. **Anderson**. OK.

Senator **Baucus**. What about that?

Mr. **Leonard**. Well, I think that if the rules are changed, then the whole process from the development of the forest plan and the level of the decision to take place in that plan and the kinds of decisions and alternatives that are looked at in the projects would have to be—you would have to have a process that makes sense.

Senator **Baucus**. Well, where should most of the effort and focus be in determining the validity of the whole generic plan? Should it be at the plan level, or should most of it be at the project level?

Mr. **Leonard**. I think most of it should be at the plan level. You know, as you look at—at least my view of where the appeals are being generated, they're not being generated over whether the timber sale road ought to go up on the left side of the creek or the right side of the creek or whether this cutting unit should be here or here. They are being generated over the question of whether you ought to be in that drainage at all or whether it's timber harvesting in that drainage is compatible with——

Senator **Baucus**. Would you agree with that, Tony and Mike; that is, that most of the focus should be at the plan level?

Mr. **Anderson**. That is how we felt all along. For instance, in the Southeast we have some plans that call for 100 percent clearcutting as the logging method, even though the NFMA says it's only supposed to be used when it is the optimum method.

Also, in the Clearwater National Forest in region 1, where some of the most erosive, unstable lands in the entire National Forest System are located, the Forest Service plan says that there are zero acres in that forest that are unsuitable because of the likelihood of irreversible soil damage, which is again a requirement of the NFMA.

In both cases, the Forest Service has come back to us and simply said, well, the plans are really not making decisions about clearcutting or what areas are going to be unstable, unsuitable for logging. That is all going to be done later.

We really disagree with that, and we would hope that Congress would, in its oversight of the National Forest Management Act, which this committee was the primary author of, would question that, whether the Forest Service is dodging the issues that Congress really intended that the Forest Service make through the forest plans.

Senator **Baucus**. One of you mentioned that there are tradeoffs with negotiations. Maybe it was you, Tony.

Mr. **Anderson**. I did, but I think he agreed.

Senator **Baucus**. Now, what are those tradeoffs? What is wrong with a negotiated solution?

Mr. **Schoonen**. No, I am not saying there is anything wrong with it. In fact, I am very much in favor of that type of thing.

Senator **Baucus**. You've put a lot of time and effort into it. I would think you would.

Mr. **Schoonen**. And you know, there are certain tradeoffs, like we are not opposed to logging. The Montana Wildlife Federation has never been opposed to logging if it is done properly. But if the timber people allow us, like in certain critical wildlife areas or watershed areas like the Rock Creek, for example, and the Deerlodge, which is a blue-ribbon trout stream, by the way, and if they can make concessions along logging and certain types of roads along those areas, then we can allow some timber harvest.

Senator **Baucus**. But what are the tradeoffs?

Mr. **Schoonen**. Well, we are not appealing it. In other words, if they went in there without a negotiated agreement, we would have to——

Senator **Baucus**. Well, what do you say to the parties who negotiated an agreement over 14 months and 25 meetings, and lo and behold somebody comes in from the outside that wasn't party to the agreement and it's all just down the drain?

Mr. **Schoonen**. When Tony Colter mentioned that, I was kind of surprised because I hadn't heard of any. In fact, I don't know what other group was there.

Senator **Baucus**. But what about that prospect?

Mr. **Schoonen**. Well, I think what we're going to have to do then, believe it or not, is probably side with the timber industry.

Senator **Baucus**. I'm sorry?

Mr. **Schoonen**. We would probably have to side with the timber industry and go on their side because we had already reached an agreement.

Senator **Baucus**. So if that were to happen, you'd appear before the appropriate decisionmaker, whether it's the Forest Service or a court and say, hey, we reached an agreement and we think this is a good one.

Mr. **Schoonen**. And all these meetings are open, and we invite everybody to come to them. And so if they don't, I feel that it's lax on their part.

Senator **Baucus**. I appreciate that.

Does anybody want to say anything else? That is, has anybody said anything this afternoon that is so outrageous that it deserves response? [Laughter.]

Mr. **Watson**. Senator, my name is Jay Watson. I work with Michael Anderson at the Wilderness Society.

We make this point very clearly in our testimony, but I wanted to emphasize it verbally here. Our position on the Forest Service appeals process is that it is a valid and functional tool to improve Forest Service decisionmaking, that it is a basic citizen's right to challenge Federal agency decisions.

And I applaud Mr. Leonard's statement earlier that just because an appeal is eventually denied doesn't necessarily mean that it was a frivolous appeal.

Like I said, the appeals process is a basic right of all Americans regardless of their interests, and if you look across the country, a whole wide range of interests have availed themselves of the appeals process. And in your home State about 11 plans are under appeal. The timber industry has filed appeals on all but two of the forest plans in your State. So it is not just environmentalists using the process.

Senator BAUCUS. I understand that. I have heard that the industry has filed as many appeals basically as has the conservation community.

On the other hand, it is true, as I see it, that there have been more timber sale appeals and there is a greater delay in timber supply. There is a problem. There are people out of work. Significantly less volume of timber is being sold now on certain forests in region 1. Regional averages mask this situation.

It seems to be, in part, because the Forest Service is spending a lot more time on environmental impact statements, more than environmental assessments, and going the extra mile to make sure they do everything right. They are having a hard time second-guessing standards that are evolving as pronounced by the Ninth Circuit Court of Appeals.

A person certainly has the right to appeal and that is part of our American system. We should maintain and continue that.

But, it also seems that we are getting kind of bollixed up here. There is a timber supply shortage and it is going to have to be addressed in some way consistent with meeting the requirements of NEPA, the Endangered Species Act, and the National Forest Management Act.

It just seems to me that we have to find a way to address the timber supply shortage consistent with those environmental statutes.

Mr. WATSON. Absolutely. But I would say that the question of overall timber supply is a very complex issue.

Senator BAUCUS. Yes.

Mr. WATSON. And it is affected by other factors far greater than the appeals process.

Senator BAUCUS. As we have discussed earlier.

Mr. WATSON. If any, it is a minor factor, I think, and there are other impacts or factors that play a far greater role.

Senator BAUCUS. I think it's major. Again we have to honor and should honor our statutes. They are there for good and right reasons. But there still is a problem.

Mr. SCHOONEN. Senator, I don't know, I thought I submitted all of this in my testimony. But this article was done by the university professor over there that mentioned that some mills are going to close anyway because of the state-of-the art milling things. And I hope I have that because it isn't all just us.

Senator BAUCUS. I was going to ask the industry that question, the degree to which increases in productivity in the mills themselves result in more timber use.

Mr. SCHOONEN. Right.

Senator BAUCUS. Workers are being processed out of mills. Fewer employees are working in the mills to process the same amount of lumber.

Well, this has been a good hearing. I think it has been very constructive, productive. I think it has shot down some of the mythology around this subject.

Mr. SCHOONEN. Thank you. We really appreciate it.

Senator BAUCUS. And I think it also has given us more facts. As with all hearings do, we now have to come up with a solution to it. [Laughter.]

That will take a little effort.

Thank you very much. We appreciate it.

Thank you, Mr. Leonard, for staying for the entire hearing.

[Whereupon, at 4:30 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[Material submitted for inclusion in the record follows:]

APPENDIX

PREPARED STATEMENT OF JOHN W. HARMAN, DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

Mr. Chairman and members of the subcommittee:

We are pleased to be here today to discuss the Forest Service appeals system. My testimony is based on our recent report [1] in which we examined the number, processing times, and backlog of unresolved appeals nationally from fiscal years 1983 to 1988, as well as whether appeals filed in fiscal years 1986 and 1987 delayed timber sales in regions 1 and 6. We will also discuss additional work Senator Baucus asked us to undertake following our report, in which we examined the extent to which appeals may have prevented region 1 from preparing its planned volume of timber sales in fiscal year 1988. Finally, we will address the extent to which these problems may continue over the next few years.

First, I would like to summarize the findings of our report and our additional work.

RESULTS IN BRIEF

In our February report, we found that the number of appeals had been increasing nationally in recent years, and that, in the two regions we examined in detail, nearly all delays of appealed sales were due to problems the Forest Service had experienced in conducting environmental analyses, which are a required part of sales preparation.

In our followup work in region 1, we found that appeals and delays continued to increase in fiscal year 1988. Consistent with our findings for earlier years, these fiscal year 1988 delays were not due to the appeals process itself. Rather they were due to underlying problems with Forest Service environmental analyses that did not meet all requirements. These requirements have been evolving as a result of court decisions. Problems with Forest Service environmental analyses were the primary reason region 1 did not achieve its target volume of planned timber sales for fiscal year 1988.

To reduce the number of delayed sales, the Forest Service has undertaken substantial revisions in its environmental analysis procedures to ensure that analyses meet all requirements. It is also making use of negotiated settlements with appellants in conjunction with recent changes in appeals regulations. However, we believe problems with delayed sales and missed targets in region 1 will continue in fiscal year 1989 and for some time beyond. The major reason for this is the absence of a sufficient inventory of future year sales with completed environmental analyses that could be used to substitute for delayed sales.

To rebuild this inventory sufficiently to avoid further delays will likely take another 2 fiscal years, because of the length of time it takes to conduct environmental analyses, and will require that additional funding be dedicated to sales preparation. To maintain this inventory level in the future, given higher environmental analysis costs, the region will also need to dedicate additional annual funding to preparing its yearly target volumes.

Before elaborating on these findings, I will provide some background on the Forest Service appeals system.

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[1] *Forest Service: Information on the Forest Service Appeals System* (GAO/RCED-89-16BR, Feb. 16, 1989).

BACKGROUND

The Forest Service appeals system allows members of the public to appeal decisions of Forest Service officers to the officers' immediate supervisors, and, prior to recent changes in appeals regulations, to further appeal in most instances if the first-level appeal was denied. Appeals frequently assert that Forest Service decisions do not comply with one or more environmental statutes and fail to adequately document effects on the environment of planned actions. In most cases final decisions on Forest Service appeals may be judicially reviewed. In 1989 the Forest Service adopted changes to its appeal regulations which reduced the number of processing steps and their timeframes for certain appeals and narrowed the bases on which timber sale and forest plan appeals could be filed.

Now I will discuss the findings of our recent report.

THE NUMBER, PROCESSING TIMES, AND BACKLOG OF UNRESOLVED APPEALS HAVE ALL INCREASED IN RECENT YEARS

In our report we found that, nationwide, the number of Forest Service appeals filed annually, the average time required to process them, and the backlog of unresolved appeals all increased significantly in recent years. Specifically:

—Appeals more than doubled nationwide between fiscal years 1983 and 1988, from 584 to 1,298.

—Average processing time for appeals increased from 201 days in fiscal year 1986 to 363 days by March 31, 1988, which is more than 2½ times as long as generally provided for processing appeals.

—The nationwide backlog of unresolved appeals grew from 64 at the end of fiscal year 1983 to 830 by the end of fiscal year 1988.

Appeals of forest plans, which were prepared for the first time during this period and are comprehensive documents establishing each forest's basic management and land use goals for a 10- to 15-year period, accounted for the largest portion of all of these increases. For example, with regard to processing times, we found that about 80 percent of the forest plan appeals in region 1 (mainly Montana and northern Idaho), in fiscal years 1986 and 1987, had not been resolved and that they took an average of nearly 2 years to go through appeal processing steps. (Region 6 had not yet issued forest plans and thus had no forest plan appeals.) Processing of timber sale appeals there and in region 6 (Washington and Oregon), also exceeded the time then provided—generally 140 days—for processing appeals, but had taken less than a third as long to process as forest plan appeals. The Forest Service was responsible for about 90 percent of processing time overruns in both types of appeals.

Regarding whether appeals delayed timber sales, about 6 percent of the timber sale volume offered in regions 1 and 6 in fiscal years 1986 and 1987 was appealed. Less than 1 percent of the total volume was delayed by these appeals. By "delayed by appeal" we mean that (1) the appeals were not resolved in time for the timber to be offered in the year it was originally planned to be sold and (2) the appeals were found to have no merit. In about a third of the cases in which the appeals were found to have no merit, the Forest Service contributed to the delays because it did not issue environmental analyses until the same fiscal year as the planned sales. Historically, environmental analyses had been issued 1 or 2 years before the timber was actually scheduled to be offered, allowing sufficient time for processing appeals.

Late issuance of environmental analyses and lengthy time overruns in processing appeals occurred because the Forest Service had difficulty responding to the increasing number of complex environmental issues raised in appeals, particularly with regard to documenting the environmental effects of planned actions. Requirements for documenting these effects have been evolving through court decisions. Region 1 officials told us that many of their environmental analyses had not met all of these evolving requirements. As a result, they had to expend considerable time and staff resources incorporating the new environmental study requirements into their responses to timber sale appeals already in process as well as incorporating them into environmental analyses not yet completed.

Because of having to revise numerous environmental analyses, regions 1 and 6 fell behind in needed advance preparation of environmental analyses for future year timber sales during fiscal years 1986 and 1987, and could not issue them until the year of the planned sales. However, despite delays in some appealed sales, both regions were able to meet their annual targets for these years because they still had sufficient inventories of future year sales with completed environmental analyses that could be substituted for the delayed sales.

At this point I will turn to the findings of our followup work regarding the extent to which appeals, versus environmental analysis problems or other factors, may have prevented region 1 from achieving its fiscal year 1988 timber sale preparation target.

APPEALS AND DELAYS DUE TO PROBLEMS WITH ENVIRONMENTAL ANALYSES INCREASED IN FISCAL YEAR 1988

Our followup work in region 1 for 1988 showed that the volume of timber sales that were appealed or litigated (some sales were taken to court) increased. Sixteen percent of the planned fiscal year 1988 sales volume was appealed or litigated, and 12 percent of this annual target was delayed (table 1). About 85 percent of this delayed volume was concentrated in 4 of its 13 forests (table 2). Similar to the experience of the 2 prior years, 98 percent of the delayed volume was due to problems with Forest Service environmental analyses (table 3).

Three major decisions made during fiscal year 1988—one by a court and two by the Chief of the Forest Service—were cited as a factor in most of the delayed fiscal year 1988 volume. Region 1 officials told us that these decisions required that additional analysis be done to (1) ensure that standards for old growth and grizzly bear habitat are met, (2) assess the cumulative effects of related Forest Service projects, and (3) determine whether further assessment of effects of projects on the ecological character of roadless areas are necessary. Moreover, they noted that these decisions also required revisions in other completed or in-process environmental analyses for a substantial volume of future year sales in which these environmental factors were also considerations.

As a result of having to do additional work on numerous environmental analyses for fiscal year 1988 and future year sales, the region could not complete them all as planned, and its inventory of sales with approved environmental documents became seriously depleted during fiscal year 1988. It could no longer substitute other sales when a delay occurred in processing an appeal or when an appealed sale's environmental analysis needed revision. Consequently, region 1 did not meet its fiscal year 1988 timber sale preparation target of 1.1 billion board feet, falling short by about 12 percent (table 4). This was particularly acute in 4 of the region's 13 national forests.

About a third of the region-wide shortfall in achieving its target involved sales in which Forest Service regional officials withheld or withdrew issuance of completed environmental analyses. They took this action because they felt that, on the basis of appeal and court decisions during fiscal year 1988, these analyses no longer met current requirements and would be successfully appealed if they were not revised.

In addition to the Forest Service's difficulties in preparing environmental analyses that meet all requirements, we identified three other factors that contributed to the timber sale problem in region 1 in fiscal year 1988:

—reductions in the region's funding and staffing, which fell 15 and 22 percent, respectively, between fiscal years 1981 and 1986;
—forest fires, which required staff diversions that interrupted preparation of about 300 million board feet of fiscal 1988 and future years' sales; and
—the absence of wilderness legislation, which has made it difficult for the region to successfully offer timber in roadless areas.

Finally, I would like to briefly discuss the extent to which the problem of delayed sales might continue over the next few years.

PROBLEMS IN MEETING TIMBER SALE PREPARATION TARGETS WILL LIKELY CONTINUE IN THE NEAR FUTURE

We believe region 1's timber sale preparation target for the current fiscal year will probably not be met because of the problems with delayed sales. The administration proposed increasing the region's target for this year to about 1.14 billion board feet. Region 1 forests officials requested that the target be reduced to 967 million board feet, or about the same as was prepared last year, but Forest Service headquarters denied this request.

The absence of completed environmental analyses will probably continue to cause problems beyond this fiscal year. In January 1989 the Forest Service adopted changes in its appeal regulations that reduced certain timeframes and steps in the process, and narrowed the bases for filing timber sale and forest plan appeals. Although we believe that these changes may reduce the number and processing times of appeals, they do not directly address the problems the Forest Service has had with environmental analyses. However, Forest Service officials told us that they believe the changes will result in greater emphasis on addressing environmental concerns in original timber sale decisions and that new requirements for early meetings with appellants will foster quicker resolution of differences. They also told us the agency has been designing staff training courses to focus on these issues. The effectiveness of these regulatory changes cannot be determined until they have been implemented for a longer period. We did note, though, that in the brief time period since their adoption, a number of region 1 timber sale and forest plan appeals have been quickly resolved through negotiation, with the result in each instance that most of the planned timber volume involved was allowed to proceed without delay. Even so, new regulations cannot address the region's most pressing immediate need, which is to rebuild the depleted inventory of future year sales with completed environmental analyses.

The Forest Service attempts to maintain a 2-year supply of future year sales with completed environmental analyses. However, as of January 1989, region 1's inventory of such future year sales fell short of the desired 2-year supply by 1.3 billion board feet. In order to rebuild its inventory to the desired level, the region will need to dedicate additional funding to timber sale preparation beyond that required to achieve its regular yearly targets. Moreover, the costs of preparing environmental analyses have increased because of more extensive requirements. As a result, the region will also have to dedicate additional funding to timber sale preparation in order to prepare its regular yearly target volumes. Even with dedication of these additional funds, the inventory of future year sales cannot be rebuilt immediately because it can take up to 2 years to complete the more comprehensive environmental analyses that are increasingly required.

Region 1's ability to rebuild its inventory could also be further complicated by the increased demand for its timber as a result of higher market prices. The timber industry harvested about 17 percent more timber from region 1's national forests than it purchased during fiscal years 1984 through 1988 (table 5). Thus, industry's own inventory of uncut timber under contract has dropped sharply at the very time the region's inventory of sales with approved environmental analyses has been depleted. If the industry is allowed to significantly expand its purchasing in the next few years in order to rebuild its own inventories and maintain harvest levels during high market prices, region 1's task of rebuilding its inventory of future year sales will be more difficult.

This concludes my statement, Mr. Chairman. We will be happy to answer any questions you or the other members of the subcommittee may have at this time.

[Tables 1-5 follow:]

TABLE 1.—APPEALED AND LITIGATED FISCAL YEAR 1988 TIMBER SALES IN REGION 1

	Volume in million board feet	Percent of annual preparation target
Region 1's fiscal year 1988 sales preparation target	1,100	100
Appealed sales	112	10
Not delayed	41	4
Delayed	71	6
Litigated sales	61	6
Not delayed	0	0
Delayed	61	6
Total appealed and litigated	173	16
Total not delayed	41	4
Total delayed	132	12

Source: GAO analysis of Forest Service data.

TABLE 2.—DELAYED FISCAL YEAR 1988 TIMBER SALES IN SELECTED REGION 1 NATIONAL FORESTS

	Volume in million board feet	Percent of regional total
Total delayed in region 1	132	100
Delayed in:		
Kootenai National Forest	60	45
Idaho Panhandle National Forest	26	20
Flathead National Forest	16	12
Clearwater National Forest	10	8
Subtotal of above 4 forests	112	85
Delayed in remaining 9 forests in region 1	20	15

Source: GAO analysis of Forest Service data.

TABLE 3.—REASONS FOR DELAYS OF REGION 1 FISCAL YEAR 1988 APPEALED AND LITIGATED TIMBER SALES

	Volume in million board feet	Percent of all delayed
Total appealed and litigated that was delayed	132	100
Delayed by appeals or litigation without merit	0	0
Delayed by Forest Service environmental analysis problems	129	98
Cause of delay unknown because appeal or litigation is not yet decided	3	2

Source: GAO analysis of Forest Service data.

TABLE 4.—REGION 1 SHORTFALL FROM FISCAL 1988 PREPARATION TARGET

	Volume in million board feet	Percent of annual target
Annual target	1,100	100
Amount prepared	968	88
Amount not prepared (shortfall)	132	12

Source: Forest Service.

TABLE 5.—HARVESTING COMPARED TO PURCHASES OF REGION 1 TIMBER, FISCAL YEARS 1984–1988

[Volume in million board feet]

	1984	1985	1986	1987	1988	Total
Harvested	969	944	1,024	1,105	978	5,019
Purchased	846	833	818	906	872	4,276
Difference	123	111	206	199	106	743
Percentage difference	15	13	25	22	12	17

Source: Forest Service data.

PREPARED STATEMENT OF GEORGE M. LEONARD, ASSOCIATE CHIEF, U.S. FOREST SERVICE, WASHINGTON, DC

Mr. Chairman and members of the subcommittee:

Thank you for this opportunity to discuss the Forest Service administrative appeals process and the timber supply problem in Montana. I am accompanied today by Bob Schrenk, Timber Staff Officer for the Northern Region.

During the past year, the Forest Service appeals process has been cited as one of the causes of timber shortages in several areas of Montana and other parts of the country. Over the last 2 years, a total of 48 timber sales were appealed in the Northern Region. Of those 48, 19 were affirmed. The remainder were either remanded, settled through negotiation, or withdrawn. In 1988, over 62 million board feet were tied up due to appeals. That represented about 6 percent of the Region's timber sale program. Although administrative appeals have delayed and in some cases stopped timber sales, we believe appeals are more a symptom than the cause of the timber shortage problems. The appeal process costs the Forest Service time and money. However, the appeal process is a beneficial tool the public and our land managers can use in making responsible natural resource decisions and detecting emerging issues. We believe our new appeal regulations will go a long way toward reducing the cost and the delays we experienced in the past.

After more than 2 years of work, in January of this year, we replaced our old appeal rule. The change did not come easily, nor was it made lightly. After much discussion internally and externally with many different people who have used our appeal process, and congressional oversight, we issued a new rule intended to simplify the process and to provide procedures that are commensurate with the nature and type of decision being disputed.

Two separate processes were created, geared to the type of decision at issue. One process applies to appeals involving a statutory right or an existing permit to occupy and use National Forest System lands. About 15 percent of our appeals workload involves this type of appeal.

The second process is more informal and applies to appeals involving land and resource management plans or project-level decisions. About 85 percent of our current appeals workload is this type of appeal. This process stresses opportunities for the public to informally meet and discuss issues with the Forest Service, both within the context of an appeal and even as a preliminary step which might obviate the need for a formal appeal.

There is no doubt that the new appeal procedures are changing the way we approach planning and decisionmaking. Although it is still early for any definite conclusions, we are greatly encouraged by what we see as a change for the better under the new rules. We already have examples of controversial timber sales and other decisions going forward because of an understanding being reached between the public and the Forest Service at a local level. This was one of the goals we hoped to achieve under the new rules. One underlying objective in developing the new rule was to get people to work out their differences in an informal setting during project development rather than waiting until after the environmental documents were complete. By informally working out differences early in the process, we expect to implement projects more quickly.

We made other changes designed to get potential appellants and decisionmakers together earlier in the process; for example, limiting review to one administrative level, but reserving a second level of review if necessary. What we hope to accomplish by this change is a better decision made with better knowledge of the public's views and preferences.

However, even with the new rule, we are still likely to experience problems in meeting our funded timber sale targets in some areas. Nationally, the Forest Service entered fiscal year 1989 with only 48 percent of the field work done on timber sales we intended to offer for sale this year. Usually, we expect all of the field work to be completed on planned sales in order to remove uncertainty and to make sure we achieve our targets. We expect to have about 60 percent of the field work completed for FY 1990 sales at the beginning of the year and about 50 percent of the work for FY 1991 sales completed at the beginning of that year.

In the Northern Region, as of October 1988, the volume under contract was about 2.4 billion board feet. Although this is about 2½ times the Region's annual average programmed sell level for the last 10 years, it is the lowest volume under contract since 1962. Volume under contract is declining on most Forests in Montana. In FY 1988, the total volume under contract in the Region decreased by 236 million board feet. As of April 1989, the timber volume under contract had dropped another 329 million board feet. The Region is approximately 1.3 billion board feet behind in meeting its objective of being 2 years ahead with prepared timber sales. On the Beaverhead, Gallatin, and Bitterroot National Forests, there is about 1 year of timber under contract. This is a serious problem. Industry should ideally have 2 to 3 years of timber under contract. This much is needed to make informed investment and management decisions about the future.

Three events brought the timber supply issue to the forefront in Montana: (1) the roadless area issue remains controversial, causing legal and administrative challenges and subsequent delays; (2) markets have been strong for a number of years resulting in significant reductions in the amount of timber under contract and creating a shortage of logs needed to keep sawmills operating; and (3) a disastrous fire season in 1988 that created problems in getting advanced sale planning and preparation work done.

We expect 25 percent of the total allowable sale quantity in the Northern Region to come from roadless areas. Entry into many, if not most, of these areas will require an environmental impact statement (EIS) rather than an environmental analysis. Because of the time it will take to prepare these EIS's and evaluate public comments, the sales must be scheduled in the last half of the decade. Because of the increasing dependence on roadless areas for the timber supply, proportionately higher investments in planning, layout and road construction will be required during the last half of the planning decade. In general, these roadless areas will be economically less viable because of lower value tree species and more difficult terrain.

Because of the small amount of timber currently under contract, there is pressure to get sales ready as quickly as possible. Often decision notices are not completed far enough in advance to allow enough time to complete the appeal process and still layout sales in time to meet scheduled sell dates.

The Forest Service has already taken steps to help mitigate the timber supply problem in Montana and across the country. In Montana, each National Forest has already begun to develop an implementation strategy that will schedule the Forest's share of the Regional allowable sale quantity for each decade. The Region is also developing a budget strategy that will allow forests to get NEPA decisions completed 2 years in advance of project execution. However, many issues—including roadless area resolutions, appeals, litigation, resource constraints, and appropriations for planning and capital investments—will affect this schedule.

Both the Beaverhead and Gallatin National Forests were budgeted in FY 1988 to complete additional NEPA work required to implement their Forest Plans. Using excess timber receipts, more Forests will be budgeted to accomplish additional NEPA work. This will also help increase the time between when the decision notice is released and the sale is offered.

Also, at both the National and Regional levels, we are placing new emphasis on NEPA/NFMA compliance in our forest plan and project level implementation efforts.

We hope the combination of these actions and the emphasis we have placed on predecisional public involvement in our new appeal regulations will create a situation conducive to refilling the "timber pipeline."

Mr. Chairman, this completes my prepared statement. In support of my testimony, I ask that the following documents be included in the hearing record: the new administrative appeal regulations and some charts and graphs illustrating the timber supply situation in Montana. We will be pleased to provide additional information and to answer any questions you may have.

[The material referred to by Mr. Leonard follows:]

federal register

Monday
January 23, 1989

Part VI

Department of Agriculture

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292
Appeal of Decisions Concerning the National Forest System; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises Departmental policies and procedures by which individuals or groups may appeal decisions made by Forest Service officials concerning the management of the National Forest System. The Forest Service is replacing its current administrative appeal regulation at 36 CFR 211.18 with two distinct processes for obtaining administrative review of decisions. One rule, 36 CFR Part 251, Subpart C, is limited to appeal of decisions regarding written instruments authorizing occupancy and use of National Forest System lands, except contracts subject to the Contracts Disputes Act, and is available to certain applicants for and holders of such authorizations. The second rule, 36 CFR Part 217, offers any citizen or organization a process for obtaining review of decisions relating to land and resource management plans, projects, and activities. The changes result from a comprehensive review of the current rule as required by Departmental Regulation 1512-1, consideration of suggestions received during that review from appellants and Forest Service officials, analysis of public comment, and consideration of suggestions from other government officials on the proposed rule as published in the **Federal Register** of May 16, 1988 (53 FR 17310). The intended effect of the rule is to simplify the appeal process and to provide appeal procedures that are commensurate with the nature and type of decision being disputed.

EFFECTIVE DATE: February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Kathryn C. Hauser, Program Analyst, National Forest System, Forest Service, U.S. Department of Agriculture, 202-382-9346.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service, USDA, is responsible for managing 191 million acres of National Forest, National Grassland, and other land known collectively as the National Forest System. The Chief of the Forest Service, through a line organization of Regional Foresters, Forest Supervisors, and District Rangers, manages the surface resources, and, in some instances, the subsurface resources, of these lands.

The Department provides a process by which individuals or groups may appeal National Forest System management decisions, currently set forth at 36 CFR 211.18. During the period Fiscal Years 83 to 85 the Forest Service received an average of 535 appeals per year, of which 235 reached the office of the Chief for review. In FY 88, 1,609 appeals were received of which 508 were directed to the Chief. Most of the latter, 308 in number, were appeals relating to the approval of Forest level land and resource management plans prepared under the provisions of the National Forest Management Act of 1976 (NFMA), and its implementing regulation at 36 CFR Part 219. Relatively few initial decisions of the Chief are appealed to the Secretary, only 10 during FY 88. Review officials are guided in the appeal process by 36 CFR 211.18, and by Forest Service policy and procedures as set forth in the Forest Service Manual (FSM 1570) and accompanying Handbook (FSH 1509.12).

Introduction

There is no statutory requirement that the Forest Service provide a grievance or appeal procedure. Rather, at its own discretion and initiative, the agency, since 1906, has provided some kind of process by which permittees and the general public could challenge forest officer decisions. In fact, until the enactment of several environmental statutes in the 1960's and 70's, the appeal process was about the only formal mechanism the public could utilize to influence agency decisionmaking. Appeal procedures were first codified in 1936 (1 CFR Part 1092, August 15, 1936). During the intervening half century, the Forest Service has periodically revised the appeal regulations responding to changing law and policy, and to its own experiences under the procedures existing at the time. During this period, the rules have shifted alternatively back and forth from informal to formal in nature, and from wholly internal administrative review to review and adjudication by independent boards.

Since 1965 the appeal regulation has been revised three times, the latest in 1982 after the agency conducted a major review of the then current regulation (36 CFR 211.19 promulgated in 1977) to comply with Executive Order (EO) 12044, the first EO to require review of existing regulations on a 5-year cycle. The result was a revised appeal procedure at 36 CFR 211.19 (18 FR 13425, March 31, 1983), the current rule.

The Forest Service announced its decision to review the current appeal regulation in the Semi-Annual Regulatory Agenda published April 27, 1987 (52 FR 14144). On May 20, 1987, the agency issued a press release announcing the impending review, and informed the public that their comments would be solicited. Subsequently, on June 11, 1987, a **Federal Register** notice (52 FR 22348) was published seeking public input about how well the current appeal process meets public needs, is likely to do so in the future, and what people like and dislike about the process. Additionally, the Forest Service issued 928 letters inviting public comment, and conducted 108 interviews with various line and staff officers throughout the agency.

The review revealed that the appeals process has served the agency and the public with varying degrees of success for many years. However, the process as it has evolved during the last few years is not the simple, quick, informal process that the agency originally intended it to be. Instead, it has become a significant generator of paperwork and a time-consuming, procedurally onerous, and costly effort, trading off resources and energies that otherwise might be directed to substantive on-the-ground resource management needs. Based on these findings, the Forest Service concluded that the appeals process needed adjustment to better serve the public and the agency. Accordingly, the agency published proposed rules revising the appeal procedure in the **Federal Register** of May 16, 1988 (53 FR 17310).

Analysis of Public Comment

In addition to publishing the proposed rules in the **Federal Register**, the Forest Service mailed 21,426 letters to known interested parties inviting comment on the rule. Also, agency personnel conducted 193 briefings for groups around the country. In response to these efforts, the Forest Service received 921 letters postmarked on or before the July 15 end-of-comment period, and more than 100 late responses, all of which were considered. Eighteen different types of respondents, as shown below, provided input:

Respondent	Number of Letters
Federal agencies, excluding FS	5
State agencies	15
City/Municipal government	4
Federal elected officials	4
State elected officials	3
County elected officials	5
City elected officials	1
Indian tribal councils	2

Respondent	Number of Letters
Professional societies	1
Conservation/environmental/ preservation organizations	127
Civic groups	4
Businesses/business groups	23
Timber industry organizations	55
Associations and unions	41
Riding and hiking interests	5
Hunting and sports groups	4
Other organizations	6
Individuals and families	614
Total timely respondents	921
Total untimely respondents	104
Total	1025

Many letters seemed campaign inspired, using similar or identical language to identify and describe respondents' respective interests or concerns, frequently referring to or referencing other respondents' statements and including them as enclosures. While there was a great deal of common information noticeable in these letters, much of this shared information was erroneous or misleading. The result was considerable comment based on misunderstanding, an indication some respondents were not well apprised about the rule itself or the preamble which presented the rationale behind the proposals. However, many of the comments received were well-informed, constructive, and well-written.

Comments substantially focused on the informal decision review process proposed for 36 CFR Part 217. These comments centered on 11 major areas of concern, constituting more than three-quarters of the total comment. These areas were: purpose and scope, notice of decision, appealable/nonappealable decisions, levels of review, filing procedures/time extensions, responsive statements, stays, open/closed communications, intervention, oral presentations, and filing fees.

After the public comment period closed, and prior to the drafting of this final rule, the Subcommittee on Family Farms, Forests and Energy, of the House Committee on Agriculture, held an oversight hearing on the proposed rule. In addition, the staff of the Senate Committee on Agriculture, Nutrition, and Forestry requested a briefing. The suggestions that arose from the hearing and briefing, along with the public comment received on the proposed rule, whether timely or late, were reviewed and have been fully considered in preparation of these final rules.

Responses received are available for review at the office of the Staff Assistant for Operations, National Forest System, Forest Service, USDA, Room 4211, South Agriculture Building, 14th and Independence Avenues SW., Washington, DC 20013, telephone (202) 382-9349.

General comments

As proposed, two separate processes would be created, geared to the type of decision at issue. One process, to be codified at 36 CFR Part 251, provides for appealing decisions when the appeal is a legally-based grievance arising from a past action that may be affected by the current and disputed decision. This appeal process would afford instrument holders or applicants a degree of process appropriate to the specific nature of their legal, business-type, relationship with the agency.

The second appeal process, to be codified at 36 CFR Part 217, involves decisions made during the planning and decisionmaking process and documented according to the National Environmental Policy Act (NEPA) and National Forest Management Act (NEMA) implementing instructions. It affords interested individuals and organizations who do not have a business-type relationship with the agency one more opportunity, following and in addition to their input during the planning process, to seek agency oversight and reconsideration at a higher level. It emphasizes public participation features currently found in planning and decisionmaking for future actions.

In addition to comments on specific sections of the proposed rules, many respondents expressed concern that: (1) Rights of appeal to which the public is legally entitled are being curtailed; and (2) the public is being divided into two classes, with some of the public relegated to second class status, with attendant diminution of legal rights.

In the first instance, many respondents believed any agency appeal regulation must afford the procedural rights of due process guaranteed by the Fifth Amendment of the Constitution that are required when property rights are affected. Other respondents believed that the appeal regulation must contain all the features of a formal Administrative Procedure Act (APA) process, including a formalized hearing procedure, an impartial judge, and provision for building a record. Some also believed that the appeal regulation is a right specifically provided by statute. There was support expressed for "streamlining" the process, but not to the extent of eliminating features considered to constitute due process (such as responsive statements and consequent replies, intervention, and oral presentations).

In the second instance, respondents' concerns about the rules creating two unequal classes of appellants centered on the perceived reduction of input opportunities for those using 36 CFR Part 217 procedures, although some respondents also felt that 36 CFR Part 251 eliminated input opportunities as well. Those who do not have a legal relationship with the Forest Service do not see the legal relationship as an adequate basis for modifying the kind of "access to process" necessary for review of management decisions.

Response: Respondents who urged that the APA must be followed failed to grasp the distinction between the types of due process intended by that Act. When an appeal procedure is mandated by statute, then specific, formalized elements of due process detailed in the APA must be applied. When an appeal procedure is not mandated by statute, but rather provided voluntarily by an agency, as this one is, then only the broad principles of the APA apply. In other words, the procedures made available by the APA for notice and opportunity to be heard must be applied fairly. Any process voluntarily deemed as "due" must then be followed by the agency which institutes it.

The procedures being adopted are based on the type of decision that has been made, and the type of relationship that exists between parties to the decision and the agency. The rules are not based on a concept that a certain class or party should have more or less access to a process for having a decision reviewed. This fundamental concept on which the two rules are based was thoroughly discussed in the supplementary information to the proposed rule, and is not presented again in this response (53 FR 17310). See Comment and Response under § 217.1 for further discussion.

Comment: The proposed rule provoked considerable general comment, largely critical, on the relationship between the Forest Service and the public. The public's concerns in this area can be described in three categories: (1) Those indicating that the proposed changes limit public input in the decision-making process; (2) arguments that public involvement prior to the decision should not preclude a readily available means to protest the decision; and (3) those reflecting a feeling that the Forest Service was operating in bad faith.

Comments from those expressing concern that the Forest Service was limiting public input were often phrased to indicate that the public sees the appeals process as one facet of public involvement. There are a substantial number of people who feel that by tightening the appeals rules, the Forest Service is trying to close a legitimate avenue of involvement.

The second group of respondents see appeals as a separate category from other kinds of public involvement, but feel that public involvement prior to decision making is not a basis to preclude redress through appeal. Several argued that, had public involvement been operating as envisioned under the National Environmental Policy Act (NEPA) and NFMA, the flood of planning-related appeals that have been so slow to resolve would never have occurred.

The third group of respondents reacted to the proposed changes more broadly in terms of trust. Comments in this category expressed distrust of the agency's decisionmaking. Some of these respondents described the agency as corrupt, deserving suspicion, hypocritical, or biased toward the timber industry.

Response: We agree that the appeals process can be viewed as a facet or type of public involvement, but appeals are a very limited means of public involvement compared to the public's opportunity to provide input in the predecisional stages. Not all the public is involved through an appeal to influence the disputed decisions: only appellants and intervenors are. The rest of the public very seldom become involved after an appeal is filed.

The Forest Service does not seek through the revised procedures to limit public involvement in decisionmaking. To the contrary, the rules emphasize public involvement prior to a decision being made, and provisions are incorporated into the rules that create explicit opportunities for conflict resolution before a decision is implemented and while a decision is being reviewed. Additionally, the final rule at 36 CFR Part 217 restores intervention as a procedural process users have been accustomed to in the past.

Nevertheless, we believe that public participation and involvement in planning and decisionmaking is more effective prior to making the actual decision than afterwards, if for no other reason than more people participate. However, public involvement prior to making a decision should not limit access to a decision review process, and we had no intent to do so. Having a decision review process is actually an incentive for the agency to commit to public involvement prior to making decisions.

The "trust" and "bad faith" comments are legitimate, if troubling, expressions of public concern. In releasing the proposed rules, the Forest Service went on record to say that the agency sincerely wants to make better decisions and involve the public more effectively and to improve its performance in handling appeals. The agency has every intention of doing this and hopes that all its constituent publics will monitor our performance and thus help the agency earn public trust.

The above three categories of comment are also responded to in the discussion of specific sections of 36 CFR Part 217, since many respondents brought up similar concerns and targeted them at specific sections.

Oral Presentations

The proposed rules at Part 217 would eliminate the oral presentation procedure, but it emphasizes the authority of the Deciding and Reviewing Officers to discuss issues with requesters and others, and to hold meetings. Currently, appeallants and intervenors must request an oral presentation when they file their notice of appeal/request for intervention; if granted, it is usually held after the record is received by the Reviewing Officer.

Comments: A few respondents supported the elimination of oral presentations, but those who did gave no reasons for their support, they simply listed a number of features that they favored.

Those who opposed the proposed change described the advantages of oral presentations, including the following: Communicates in a way that is impossible to achieve on paper; clarifies issues and positions; permits "give and take" between the parties; helps verify the sincerity of each party's beliefs; gets at the "heart" of the appeal; enchances dialogue leading to resolution of disagreements; permits viewing physical evidence; and reduces angry feelings triggered by reading the impersonal documents.

Several comments noted the dual standard which allows oral presentations under Part 251, but not under Part 217.

Some respondents said that the lack of oral presentations will lead to more litigation because fewer appeals will be settled to appellants' satisfaction. Others feared that flawed decisions would result from eliminating communications with appellants such as responsive statements and oral presentations afford. And, one respondent was disappointed with the apparent lack of "openness" signaled by the rule; while another feared that the change signifies the elimination of all public involvement meetings.

One claimed the oral presentation is "less time consuming" than extracting information "from the review file."

Response: Opportunities for and references to more openness, direct contact between Deciding Officers and participants, and resolution of issues during a review abound in the proposal and are explained in the preamble discussion.

While the formal feature of oral presentations permitted under the current rule would be eliminated under Part 217, the proposed process features and promotes options for informal meetings and discussions. In addition, the final rule includes a new provision that any of the parties may request such meetings at any time during the appeal. The benefits of what is called an "oral presentation" under the current rule still accrue to everyone involved. Consequently, the final rule regarding oral presentations, remains as proposed.

Filing Fees

For the reasons stated in the supplementary information to the proposed rule (53 FR 17314), a requirement for filing fees was not included in the proposed rules. However, public comment was solicited on the possibility of imposing filing fees because the fee idea as a requisite part of the appeals process is a recurring one. The increased number of appeals filed during the past year or two leads many observers to believe that the administrative appeals process provided under 36 CFR 211.18 is being abused by groups and individuals to disrupt resource programs, especially timber sale and harvest in some areas of the country. In response, many groups and individuals have proposed that a significant filing fee be imposed to cover the cost of processing an appeal, a strategy designed to prevent "frivolous" appeals.

Comments: Public comment on the filing fee idea was 3 to 1 opposed. Most respondents felt that imposing fees of any sort would be counter to the historical objectives of the Department and the Forest Service in providing the public an open, informal administrative appeals process. Additionally, they thought that it would be costly to taxpayers, and only result in further complicating the appeals process. A few respondents questioned whether the agency has statutory authority to require a fee as a condition of filing an appeal if the objective is to recover costs. Others felt that fees, whether to recover costs or a modest filing charge, would discriminate against parties not able to afford the charges, and thus give rise to some sort of waiver policy. Some respondents cited beliefs that filing fees should be unnecessary, given the thrust of the revised rules to make better decisions earlier so that sufficient time is available for appeal review without holding activities such as timber sales and subsequent harvests in abeyance. Supporters of filing fees generally cited a need for a mechanism to combat, from their perspective, the "frivolous" appeals that delay resource activities, particularly the sale and harvest of timber from many National Forest areas. Other respondents also suggested that a bond be required where an economic hardship on a third party would be created by a decision to stay implementation of a project or activity.

Response: Public comment about imposing filing fees can be divided into two areas of concern, one dealing with policy considerations, the other with legal authorities. The following discussion examines the implications of these concerns and serves as the basis for the decision not to include filing fees as a requisite part of the administrative appeal processes established in this final rulemaking.

1. *Possible impact on NEPA procedures.* The Forest Service administrative appeal regulation is closely linked to fulfillment of public notice and opportunity to comment requirements of the NEPA implementing regulations (40 CFR 1506.10). Under the NEPA regulations, the Forest Service has been permitted to issue decision documents along with the environmental disclosure documents because the administrative appeal procedure gives the public opportunity to challenge a decision. The likelihood that filing fees could discourage use of the appeal process calls to question whether the Forest Service could continue to issue environmental disclosure and decision documents simultaneously.

2. *Impact of substantial fees.* Historically, the Forest Service has invited and encouraged public use of the administrative appeal process, consciously and successfully developing a public expectation that it may freely gain access to decisionmakers through the appeals process. The process has served well, albeit slowly at times, as a policy review mechanism to test and adjust agency direction. Substantial fees would operate to discourage appeals; as a result, the policy review mechanism would lose effectiveness with any decline in use of the process.

In defending agency action, government counsel often argue in litigation that plaintiffs must first exhaust their administrative remedies. Imposing substantial fees could lead to more direct filings in Federal District Courts, thus depriving the agency of opportunity to review and document its decision (through administrative appeal proceedings to show rational decisionmaking) prior to litigation. Imposing a substantial fee would also likely promote requests for a fee waiver procedure process (similar to Freedom of Information Act (FOIA) situations) and further complicate the administrative appeal process.

High fees also would tend to discriminate against individuals rather than organizations. While any nominal fee would discourage appeals by individuals who file non-specific appeals on numerous projects, imposing fees only for the purpose of limiting appeals affects all potential appellants without regard to subject matter or merit. As a matter of policy, other alternatives to limit the negative effects of appeals could be more effective, as for example, simplified processing, faster reviews, as well as improved public involvement prior to the decision.

3. *Inconsistency of fees with simpler, streamlined review process.* Initiating substantial fees would seem inconsistent with amending the existing appeal process for simplicity. The proposed regulation, 36 CFR Part 217, modifies existing administrative appeal features appellants have come to rely on or view as "due process protections." If the agency imposes substantial fees, appellants will expect more "due process" protections, such as right to confront and interrogate witnesses, right to several levels of appeal, right to responsive statements, etc.

Once an appellant has invested a substantial filing fee, settlement for less than complete relief may be less likely, and the tendency to litigate an adverse and costly appeal decision will likely increase.

4. *Statutory authority for fees.* There is no specific statutory authority for the Forest Service to require a fee as a condition for filing an appeal. However, the Independent Offices Appropriation Act, as revised (31 U.S.C. 9701 (1986)) might be considered authority for a reasonable fee. Under this Act, such charge is to be fair and based on the cost to the government, the value of the service, public policy or interest served, and other relevant facts. The agency has invited the public to utilize the appeals process, so it may be questionable whether its use by the public is a "service" to the public as contemplated by the Act.

A fee of $1,000, as proposed by some respondents, would probably exceed the scope of the Act, and would be far beyond fees imposed upon private parties by Federal District Courts ($120), U.S. Claims Court ($60), and Federal Circuit Courts ($100). Federal court fees are not based on costs of service, but on separate statutory authority to collect fees. However, these courts may award damages, costs, and attorney fees in favor of successful parties. It would appear that specific statutory authority for filing fees is needed so that substantial, high fees could be insulated from serious judicial scrutiny.

Other formal administrative bodies within the Department of Agriculture, such as the Agriculture Board of Contract Appeals, and the Judicial Office which holds all formal APA hearings for the Department, impose no filing fees or require bonds. Neither are fees imposed in the "protest" procedure for certain decisions involving land and resource management plans of the Bureau of Land Management, Department of the Interior. Moreover, limiting fees to only certain types of activity, such as timber sale and related harvest activity, might be deemed arbitrary and capricious.

5. *Fees based on cost recovery vs. minimum filing fee.* The Forest Service appeals workload nearly doubled from 874 cases in FY 87 to 1,009 cases in FY 88. No cost breakdown is available for 1988, but for the previous 2 years, direct costs to process appeals during those years averaged $5,304,952, or about $5,424 per case. Facing this situation, fees based on cost recovery would place the administrative appeal process beyond the reach of most individuals and small organizations, and thus undermine the basis for having an appeal process. A fee collection program involving a nominal fee for administrative appeals, based on other experiences in fee collection activities elsewhere in the agency, would cost about $35 per appeal. For 1988, this would have amounted to only $35,315. The administrative burden of collecting fees would not be worth the small amount collected. Therefore, for the reasons set forth, the final rule does not include provisions for fee collection in either 36 CFR Part 217 or 251.

Specific comments

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 217, and the Department's response to these comments. Although reviewers were asked to key their comments to specific sections, the majority did not respond in this manner. Also, many comments embodied multiple sections. Where this is the case, our response to the public comment similarly embodies multiple sections. Many respondents pointed out that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process and many of the headings have been retitled to better describe their contents. However, the publics' comments and our responses are keyed to the section numbers and headings of the proposed rule document.

Section 217.1 Purpose and scope.

This section stipulated that this is an informal review process and is tied to the NEPA process. Only decisions documented as a consequence of agency compliance with NEPA procedures are reviewable under this rule. The proposed rule emphasized public participation and dispute resolution, and deemphasized process and procedures.

Comments: Some respondents thought that making two rules out of the current one rule was unfair because due process aspects retained in 36 CFR Part 251 are not provided for in 36 CFR Part 217. These respondents felt that they are just as entitled to due process in Part 217 as are permit holders under Part 251. They also commented that decisions under 36 CFR Part 251, specifically timber and mining activities, affect more than just the permit holder and should be appealable by other interested and affected parties.

Response: Some misinformation persists concerning what would be reviewable under Part 217 versus what would be appealable under Part 251. Decisions concerning mining activities authorized by appropriate written instruments are not confined exclusively to Part 251 as some respondents thought. If such activities involve environmental analysis and documentation prior to a decision to issue or modify an authorization, review of the decision would be available under 36 CFR Part 217. As is currently the case, disputes between the Forest Service and a timber purchaser arising from administration of a timber sale contract will continue to be administered under 7 CFR Part 24, the Contract Disputes Act.

Those respondents who feel they have the same rights to due process as holders of written instruments issued by the Forest Service need to understand better the fundamental basis on which the two-rule process was developed and proposed. Elements of due process are incorporated in the Part 251 regulations because of the legal and business relationship involved between the holder of the written instrument and the Forest Service. As noted in the preamble to the proposed rule, this relationship does not exist between the Forest Service and individuals and groups who disagree with a resource allocation or management decision. Therefore, it is not believed necessary to provide the same degree of due process as provided in Part 251 for appealing a management decision under Part 217. Moreover, the publics who wish to dispute a management decision under Part 217 do not have a legal right to administrative appeal. They do have a legal right to timely notice of a decision, but access to an appeals process and the right to be heard in a prompt, objective review of the decision are provided at the administrative discretion of the Forest Service.

This Department does not believe it is in the best interests of National Forest System management or public policy to disrupt or delay management activities over long periods of time. It is in the public's interest to have a timely mechanism for reviewing decisions and either abandoning the management action or proceeding to implementation.

Therefore, the final rule retains two separate rules, emphasizes the multiple opportunities prior to review of a decision for the public to influence decisionmaking, and points out the role of constructive dialogue between participants during the review. However, in recognition of the public comment, some elements of due process in 36 CFR Part 251 have been incorporated into the final rule at 36 CFR Part 217. These are intervention and additional stay procedures. These are discussed under §§ 217.4 and 217.12 of this preamble.

Section 217.2 Applicability and effective date.

This section would allow for the continuance of appeals that have already been filed under the current rules at 36 CFR 211.16, 211.18, 228.14, and 292.15. No comments were received on this section. Therefore, this section is retained as proposed but it is recoded as § 217.19.

Section 217.3 Definitions and terminology.

This section provided definitions for the terms used in the rule.

Comments: The only comment received on this section was from seven respondents who objected to the words "request" and "requester," stating it was confusing and appeared to set up a class distinction.

Response: It was not the intent of this rule to set up a class distinction. The intent in using the words "request" and "requester" was to make a distinction between the more formal procedures in 36 CFR Part 251 and the simpler review process of Part 217. However, because respondents found these words confusing, the final rule restores the currently utilized terms of "appeal," "appellant," and "intervenor." This section has been modified to reflect this change and conforming amendments are made elsewhere in the rule for consistency throughout the rule. This section is recoded in the final rule as § 217.2.

Section 217.4 Eligible participants.

The proposed rule established a review process accessible to a virtually unlimited range of interests. The only limitation was that Federal entities, as well as Forest Service employees, would be excluded from participation in this review process.

Under the current rule, anyone can request to intervene at any time during the process. The proposed rule eliminated intervention as a formal process but provided for accepting written comments into the review file from any interested person or organization.

Comments: The respondents to this section represented two points of view. One concerned exempting Federal organizations and Forest Service employees from using this rule. These respondents pointed to the possible need for Federal organizations to have access to this review process as an alternative to existing issue-resolution mechanisms that might prove unproductive in occasional instances. Some respondents also believed that a Forest Service employee who has a private property interest in land impacted by a management decision should be able to request a review under this rule.

The other view concerned intervention. The majority of these respondents felt they have a "right" to intervene as they have been accustomed to under 36 CFR 211.18. Consequently, they want that "right" retained. However, some respondents added the recommendation that time delays to permit intervention should not be permitted.

Response: Means for resolving disagreements between Federal agencies concerning proposed major Federal actions that might cause unsatisfactory environmental effects are available through the Council on Environmental Quality (CEQ) (40 CFR Part 1504). Moreover, Federal agencies have informal mechanisms through the agency heads to bring their concerns to the attention of the Forest Service. No purpose would be served by providing agencies an additional administrative process to challenge decisions. Therefore. the final rule retains the exclusion.

- Forest Service employees having a private property interest in land subject to impact from a management decision would have access to appeal under 36 CFR Part 251. Therefore. the final rule retains the exclusion of employees from challenges to management decisions.

In the proposed rule. the Forest Service viewed intervention as a structured process for involvement when rights have to be protected, e.g., rights of parties that may be injured by an appeal decision. However. injury was not the focus of proposed 36 CFR Part 217. Rather, it was designed to review information developed through National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) planning activities and attendant public participation. The intent of 36 CFR Part 217 was to provide an optional final step, through appeal, in this decisionmaking process to review the kind and quality of information in the environmental documentation, including the decision itself. If that information is inadequate for a Reviewing Officer to substantiate the decision. the decision would likely not stand on review. The agency welcomes all forms of information germane to the decision and its supporting documentation. But, formal intervention as practiced under the current appeal rule and retained under the proposed rule for Part 251 was not considered appropriate to this information assessment step, anymore than it is considered suitable as a structured mechanism during the earlier steps in the planning and decisionmaking process. The agency continues to believe that providing all the "formal" embellishments of intervention is unnecessary and counterproductive to achieving the initial goals of offering a separate, less formal process for review of management decisions.

However, having considered the public comment which strongly favored retention of intervention, the final rule provides for a simpler form of intervention than does the current rule or in Part 251. Under the final rules at Part 217, intervention will be granted if requested within the time period provided, intervenors can provide comments on issues raised in the notice of appeal, have the right to receive and comment on additional information requested by the Reviewing Officer, and can participate in resolution meetings. Unlike the current appeal rules, intervenors under Part 217 cannot intervene at any time, request a stay, or continue an appeal if the appellants withdraw an appeal. The agency believes that this form of intervention both meets the concerns of those who were concerned about the loss of stature in and access to the appeals process and still contributes achieving an unarrayed, less formal review procedure, a major objective of this rulemaking process. A new section coded § 217.14 and titled "Intervention" addresses this change. Because intervention will be permitted, there is no need to provide for written comments by other individuals. Therefore, the provision has been deleted in the final rule. In addition, in the final rule, the section entitled "Eligible participants" is recoded and retitled § 217.6 Participants.

Section 217.5 Obtaining notice of decision.

The proposed rule required notice only through publishing a legal notice in a newspaper of general circulation in the area affected by the decision, and notice of certain other decisions in the **Federal Register**. The review period would begin with the date of publication.

Comments: A common perception by respondents was that notice in the **Federal Register** or a newspaper would replace the current practice of mailing a Decision Notice or Record of Decision to interested and affected persons. Respondents felt that anyone who had expressed interest in the decision should be notified in writing. Respondents mentioned the drawbacks of **Federal Register** notification, such as being time-consuming, not readily available to the general public, and expensive. Problems associated with newspaper notification included: The definition of general distribution; local people do not usually subscribe to regional papers; people outside the circulation area of a local newspaper would not have ready access to the notice; delays in notice because local rural newspapers are often weekly; Forests are often served by several newspapers.

Response: Motives for specifying legal notices were misinterpreted as trying to maintain secrecy, attempting to rush implementation of controversial projects, and reducing the ability of the general public to appeal decisions. The legal notice requirement was intended to be an *addition* to the notice requirements specified by the Council on Environmental Quality (CEQ) at 40 CFR 1506.6. And, the date of the published notice was intended to signify the start of the review period.

Because of this misunderstanding, this section has been rewritten to include common practice currently observed by the agency, applied to all decisions appealed under this rule. The rule also requries that **Federal Register** notice will be given on decisions that are considered to have effects of National concern, and appealable decisions made by the Chief. The requirement for legal notice has been made discretionary because it presented more problems than solutions. The appeal period will start on the day following when the decision document is signed and dated, as is currently the practice. Additionally, the final rule specifies that the decision will be mailed promptly so that those wishing to utilize the process will have the maximum time available to them.

This section has been retitled Giving notice of decisions subject to appeal.

Section 217.6 Decisions subject to review and Section 217.7 Decisions not subject to review.

Part 217 proposed a review process applicable to all decisions arising from a NEPA evaluation, and documented in a Record of Decision, Decision Notice, or Decision Memo. It excluded all other decisions plus a list of exclusions similar to the current rule. Further, the proposal excluded catastrophic events from review when the Chief or Regional Forester believes it critical to move quickly with rehabilitation or salvage and publishes an exclusion to this effect in the **Federal Register**.

Comments: The majority of the comments dealt with these two sections as one subject; thus, we are responding in a similar manner.

Some respondents suggested that a proposed action should be appealable only on the basis that it is inconsistent with the Forest plan, thus narrowing the scope of review. Other respondents wanted a broader definition of what should be availlable for decision review They saw the narrowing of the process as restricting citizen oversight of decisions affecting National Forest management because administrative, policy, and procedural decisions are not covered by this review process. There was some concern voiced regarding which regulation (36 CFR Part 217 or 36 CFR Part 251) would apply for certain decisions and whether the Forest Service or the requester/appellant would make the choice.

Many respondents said decisions on catastrophic events should not be excluded from review. They said the Forest Service would abuse the definition and slip in other things besides these natural events.

Response: Currently, appeal of rehabilitation activity decisions are covered by an interim rule at 36 CFR 211.16. Folding the broad provisions of this rule into the final rule eliminates a separate rule, but it retains the opportunity for the public to request review of decisions concerning rehabilitation activities unless the Chief or the Regional Forester, because of severity and time lines, makes a decision to exclude them, and publishes a notice to this effect in the Federal Register.

The notion for narrowing the scope of review to only whether a proposed action is in conformance with the Forest plan has a defect. First, some sort of review would be needed to determine whether the disputed action conformed to the Forest plan. We expect most actions would. What's critically important is: Does the decision to undertake the disputed action meet NEPA requirements? The action might conform to the plan but not NEPA. Therefore, the proposed action should not proceed until it is in compliance with both the Forest plan and NEPA. Thus, the final rule does not narrow the scope of review.

Policy-type administrative decisions were not included in the review process because they determine how the agency is to approach a task or situation. These policy decisions seldom require documentation of environmental impacts. Under the current rule, policy or procedural decisions have constituted only a miniscule proportion of appeals received. Other administrative avenues are open to the public to influence decisionmaking of this kind, and to request reconsideration, which would be more efficient than utilizing the appeal process. For example, many Forest Service policies and procedures are published in the Federal Register for comment. Additionally, notice of such comment opportunities is mailed to interested and affected persons and often also announced through press releases.

There was never any intent that the Forest Service would choose which rule would be applicable to a particular decision. The choice is up to the appellant to make. Each new rule, 36 CFR Part 217 and 36 CFR Part 251, clearly defines which kind of decision is covered by which rule.

The final rule retains the proposed inclusions and exclusions, but the sections are recoded and retitled § 217.3 Decisions subject to appeal and § 217.4 Decisions not subject to appeal.

Section 217.8 Levels of review available.

Under the proposed rule change, a second level of review was a discretionary decision by the Reviewing Officer at that level.

Comments: Many respondents objected to the concept of a one-level review process because: they felt it was designed for agency expediency at the individual's expense; it vested an inappropriate amount of power in one person; it did nothing to encourage or promote negotiated settlements; and it would lead to cursory and superficial review. And, while reducing the number of appeals, respondents saw the one level review as increasing the potential for more litigation.

The major concerns about the one-level review centered on District Ranger decisions. Respondents focused on the Forest Supervisor as final reviewing officer, doubting that the review could be objective because the project or activity (action) being appealed was in keeping with goals established by the Forest Supervisor and may have been undertaken with advice and supervision from the Supervisor's level.

The second area of concern over the one-level review process centered on concerns that the current second level was a vehicle to make upper levels of the Forest Service aware of local issues which have possible regional or national implications. Many respondents felt that the second review was also a chance to be heard by those who had a broader perspective of Forest Service policy and national issues; that it was a chance for the Chief to clarify policy to the field; and it was seen as a chance to make national organizations aware of local concerns.

Many found the idea of discretionary review unsatisfactory for a variety of reasons. There was concern that without specified decision criteria there would not be a fair way to determine if a second level was needed. Several respondents stated they felt they should automatically receive a second review. And some respondents stated that public controversy should be a reason for second review.

Considerable concern was expressed that the 15-day period to exercise discretion was insufficient, and that the 30-day second level review period would not permit adequate consideration, thereby causing the lower decision to stand by default.

Response: Although there were numerous comments on the need for two levels, the one-level review with discretionary review at the second level best fits the intent of the rule. It simplifies the process, improves the potential to process appeals in a timely manner, yet retains the option for a second review. Inherent in the process is the requirement for full and proper use of the NEPA process. The NEPA process requires Federal agencies to involve the public early and continuously throughout the decisionmaking process; thus a fair and open hearing on issues related to a decision are available. Lastly, the intent of the rule is dispute resolution by establishing stronger ties between the initial decisionmaker and the public, all in the overall interest of making better National Forest management decisions.

The public perceived the relationship between the Forest Supervisor and the District Ranger as being so close as to prevent an objective review of Ranger decisions by Forest Supervisors. Even though 82 percent of the District Ranger decisions currently appealed are resolved without a second level appeal, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level review of a Ranger decision by the Regional Forester will not be automatic. It will have to be requested, and the review will be based solely on the existing record without additional submissions. The second level appeal decision will not receive further review.

In the final rule, a new paragraph (d) was added to clarify that Forest Supervisor's dismissal decisions are subject only to discretionary review, not to a second level appeal.

This section is recoded as § 217.7. The provisions detailing how discretionary review will work have been moved to a new section, § 217.17 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 217.8, 217.13, 217.14, and 217.15. For response to additional comments on discretionary review see the discussion under § 217.15 Review decision.

Section 217.9 Filing procedures and timeliness; Section 217.10 Extension of time; Section 217.11 Content of a request for review.

The proposed rule eliminated the discretionary extension of time for filing a Statement of Reasons, while maintaining extension options for all Forest Service deadlines, except at the discretionary review level. The proposal required that the Statement of Reasons material be filed with the Request for Review. And, it included very specific direction on what must be included.

Comments: Public responses tended to link these three sections together. Many respondents felt that preparation of an appeal, including the complete statement of reasons, in the allotted 45 days could not be accomplished, and recommended provisions for extensions. Some claimed that the Forest Service was biased against individuals and volunteer organizations which would be working nights and weekends to provide the analysis, and be less likely to meet the 45-day limit than organizations which have paid staff. Several pointed out that extensions are needed in order to request and obtain needed data from the Forest Service. Others mentioned that, although they had been involved in the development of major projects, the Environmental Impact Statement preferred alternatives often change between draft and final, and that an entirely new review and analysis opportunity is therefore needed. Many pointed out that the proposed rules allow the Forest Service to grant itself extensions, and felt this was unfair, since the agency holds all the information and should be the best prepared to meet timeliness. Respondents mentioned that Forest Service failures to meet timelines under the current process are causing significant project delays and that the proposed rule perpetuates this situation.

Response: While this rule emphasizes dispute resolution, it is not intended to take the place of early and continuous public participation in the agency's NEPA-based planning and decisionmaking process. If the public is concerned about National Forest management matters, it has a responsibility to work with responsible officials in the development of various environmental documents prior to decisions being made that are subject to appeal under this rule. The final rule retains the 45-day filing period, with no extension permitted, for those appealing a decision on a project or activity. However, taking into consideration the public comment, the final rule has been modified to provide a 90-day filing period for those appealing a decision on a land and resource management plan approval, significant amendment, or revision, or on programmatic decisions documented in a Record of Decision. It should be noted that the longer appeal period does not change the effective date of the decision.

Additionally, the final rule has been modified to limit when the Forest Service can grant itself time extensions. Reviewing Officers will be permitted to extend the time of the review period only to request, acquire, and evaluate information needed to clarify issues, or to hold meetings to resolve issues.

Responding to public concerns that the new rule just perpetuates current Forest Service practice of not following timelines, and recognizing as an agency that internal management must be improved, a new paragraph has been added to clearly delineate how long the process should take.

For clarity, and because all these changes deal with how the appeal process will work, §§ 217.9 and 217.10 have been combined. These sections are recoded § 217.8 and retitled Appeal process sequence. Section 217.11 is recoded § 217.9 Content of a notice of appeal. Proposed paragraph (b)(7) would have required appellants to state whether they had participated in predecisional activities. This paragraph has been dropped from the final rule because of the confusion it caused. Even though knowing whether or not an appellant has participated in predecisional matters is desirable, whether or not a participant was involved in predecisional matters was not intended to be a basis for dismissal. However, this was how the public interpreted the requirement.

To assist the public in understanding the timeframes and sequence of steps under the new rule, a flow chart of the process is set out at the end of this document as Appendix A; however it will not appear in the Code of Federal Regulations.

Section 217.12 Requests to delay implementation of a decision.

Proposed Part 217 did not permit delaying implementation of a Forest plan, but provided for an automatic delay of implementation of projects or activities scheduled during pendency of the review, upon request, so that a meaningful review on the merits would be preserved. The delay decisions were not subject to further discretionary review.

Comments: Most of the comments received concerned five major themes, characterized as follows: (1) All parties concerned should be notified of a delay request and the decision to grant or deny the request; (2) "urgent and compelling need" should be defined, preferably with examples; (3) requests to delay implementation should be granted automatically *except* under extraordinary circumstances; (4) requests to delay should be granted *only* under extraordinary circumstances; and, (5) there is a need for clear and comprehensive guidelines (standards) for granting a delay request. Many respondents pointed to a dual standard because in 36 CFR Part 251 the appellant has to justify the request for stay while under 36 CFR Part 217 the government is required to justify not granting a delay request.

Several respondents wanted the denial of a delay request to be appealable. Lastly, many respondents thought that the proposed provision which excludes delay of Forest plan implementation meant that subsequent projects would not be subject to delay, and that this was unacceptable. And, some respondents disagreed with quoted language from the preamble, "* * * there are not actions in a forest plan per se that would be immediately implementable and thus there are no actions to be stayed."

Response: In retrospect, the language should have stated, "* * * there are *seldom* any actions in a forest plan per se that would be * * * immediately implementable, and thus there are no actions to be stayed * * *". If a site specific project or activity is authorized in the forest plan, and which meets NEPA requirements, a delay should be considered if implementation would moot the review. Thus, the final language of the rule has been modified to make such projects or activities within a plan subject to delay if appellants so ask.

It has always been the practice of the agency to notify all parties concerned about stay decisions (referred to in the proposed rule as delay of implementation requests). This will not change with new rules.

The automatic stay device in the proposed rule was viewed as a way to preserve a meaningful review and simultaneously avoid forcing a requester to Court to obtain a restraining order. But in response to the dual standard concerns for granting stays voiced by respondents, the final rule provides that stay requests will not be automatically granted but will be considered and that stay requests must include specific reasons why the delay is needed. It is on this basis that the Reviewing Officer will either grant or deny a stay. Accordingly, the "urgent and compelling" standard is no longer necessary and has been deleted.

Additionally, the term "implementation" in proposed paragraph (a) has been changed to read "approval." It was the intent of this paragraph to preclude stays of plan approvals, but to consider staying activities undertaken to implement the plan, which as a consequence might moot a review if prematurely implemented. This change clarifies this intent.

For consistency with providing two levels of review on District Ranger decisions. the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request. And. consistent with other language changes for clarity and understanding. the final rule has been modified to use the term "stay."

This section is recoded § 217.10 and retitled Stays.

217.13 Review file.

The proposal defined what consitutes the review file and specified how much time the Deciding Officer would have to assemble the relevant decision documents and pertinent records and transmit them to the Reviewing Officer. In contrast to the current rule. the Deciding Officer would not be required to prepare a Responsive Statement. Instead. the proposal allowed the Deciding Officer to respond briefly to issues raised in the request for review when transmitting the file to the Reviewing Officer.

Comments: Respondents voiced their concerns about the elimination of the Responsive Statement. The most frequent comments pertained to the value of the Responsive Statement and the reply thereto in "clarifying" the issues and in "justifying" the decision to proceed with an action. The Responsive Statement is seen by many as a way to foster dialogue about the rationale for the decision. the meaning of special terminology or technical matters. and the intent of the proposed activity. Many said that the current requirement to prepare a Responsive Statement helps ensure that the Deciding Officer understands an appellant's position.

Additionally. some respondents pointed out that the responsive statement had been eliminated in name only. Because the Deciding Officer would be allowed briefly to respond to issues in the transmittal letter. the letter would be. in fact. a Responsive Statement. and the appellant is given no opportunity to review or respond.

Response: Under the current rule. Responsive Statements are being used to carry the burden of discussion and justifying a project. plan. or activity. The intent of 36 CFR Part 217 is to focus on the environmental documentation and decision document completed as a consequence of the planning and decisionmaking process. and made available to those participating in the decisionmaking process. and to others prior to an appeal being filed. If the decision document does not "justify" the decision to proceed with an action. or explain the rationale for the decision. it is inadequate. A Responsive Statement is not necessary for a Reviewing Officer to make this determination. The purpose of eliminating the Responsive Statement is twofold: To expedite processing of an appeal and to ensure that NEPA-based decisions are adequately documented. The result should be better decision documents that reflect environmental disclosures and explain management action rationale. For these reasons. the final rule does not reinstate the requirement of a Responsive Statement. To prevent transmittal letters from becoming de facto Responsive Statements. the final rule deletes the provision allowing the Deciding Officer to respond to issues raised in the request for review. but retains the requirement that the Deciding Officer identify where in the documentation appellant's issues are addressed. The transmittal letter wil be made available to appellants and intervenors.

Other modifications to this section include giving Deciding Officers 30 days to transmit the record. instead of the proposed 21 days. This is because the rule has been modified to eliminate time extensions for this purpose. which under the current rule have nearly always been granted if requested. Lastly. taking into account other changes. the final rule states that the record closes either when the Deciding Officer forwards the record or when intervenors' comments are received. which ever is the latter.

This section is recoded and retitled § 217.15 Appeal record.

Section 217.14 Authority of reviewing officer in conduct of a review.

Part 217. as proposed. authorized the Reviewing Officer to establish whatever procedures are necessary to ensure orderly and expeditious conduct of a review. This section retained the provision of the current rule at 36 CFR 211.18 allowing a Reviewing Officer to consolidate reviews of the same decision or similar decisions involving common issues of fact or law. In keeping with the informal nature of the proposed review process. the Reviewing Officer has the authority to discuss issues related to the review with requesters. the Deciding Officer. or those who submit comments.

Comments: Part 217. as proposed. would permit free and open communication between parties with no requirement that these communications be documented or shared. Because of this. respondents raised the question of "*ex parte*" communications in which the Reviewing Officer is influenced by these discussions and the requester is not informed about them. Most respondents stated that the public had a right to know. The comments frequently used strong language to characterize this feature. such as unfair. undemocratic. prejudicial. secrecy. "back room deals." hiding information. etc. A few comments reflected a fear that internal documents would be immune to public review and that public participation would be discouraged.

One respondent suggested that. for purposes of issuing one decision. consolidation of appeals filed pursuant to Part 251 and reviews requested pursuant to Part 217 should be permitted. provided. of course. that both involve the same initial decision.

Response: This section has been modified to make it clear that any information sought by or otherwise utilized by the Reviewing Officer must be documented and shared among and between appellants and intervenors with opportunity afforded for comment. However. communications among or between the Deciding Officer. appellants. or intervenors do not have to be documented and made part of the record. Consolidation of review of appeals filed under Parts 217 and 251 which involve the same decision is not permitted. but the rules make clear that issuing only one decision may be appropriate.

In addition. as discussed under § 217.10. Reviewing Officers will be permitted to extend the time of the review period only to request. acquire. and evaluate information needed to clarify issues. or to hold meetings to resolve issues.

This section is recoded as § 217.13 and retitled. "Reviewing officer authority." Additionally. that portion dealing with discretionary review has been removed from this section and incorporated in § 217.17 Discretionary review.

217.15 Review decision.

The proposal established timelines for review decisions. 30 days for project decisions and 90 days for LRMP's. and stipulated that if no decision is made within 30 days once a decision is accepted for discretionary review. the lower level decision stands.

Comments: Several respondents felt it was unfair to allow the Forest Service twice the time to issue a decision on an appeal of a Forest plan decision (90 days) than is allowed for an appellant to read and review the plan. gather data. and prepare the request (45 days).

As discussed in § 217.8. many respondents found the idea of discretionary review unsatisfactory. voicing concerns that the timeframes would force a hurried review. because the 15-day period was insufficient to exercise discretion. and the 30-day second level review period was too short. These respondents believed that the appellants would be punished by Forest Service procrastination or choosing to ignore the appeal. as the lower level decision would stand if timelines were not met.

Response: The 90-day timeframe for a Reviewing Officer to render a decision on an appeal of a Forest plan decision is retained in the final rule. As discussed under proposed § 217.9. the time available to prepare and file an appeal of a Forest plan has been modified. Thus. appellants of Forest plan decisions will have the same amount of time to prepare their appeal as the Reviewing Officer has to render a decision.

In response to comments that criteria are needed to guide a second level Reviewing Officer when deciding whether or not to review a lower level appeal decision. the final rule has been modified in § 217.16 to explain circumstances under which a Reviewing Officer might elect to exercise discretionary review of a lower decision. For example. a Reviewing Officer would consider such factors as controversy and litigation potential.

While the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents. it is 5 days more than currently provided at the Chief's level. Thus. it is retained in the final rule. However. a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point. the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt. the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls. including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. Finally. the paragraph on discretionary review has been moved to a new section. § 217.17 Discretionary review.

The agency agrees with those respondents who expressed concern about appellants being punished by Forest Service procrastination. Therefore. the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. This section is recoded as § 217.16 and retitled "Decision."

217.16 Dismissal without review and decision.

The proposal specified the circumstances which would allow the dismissal of a review request without review.

Comments: Provision for dismissal without review was of considerable concern. Some respondents felt that the reasons for dismissal in the proposed rule were not clearly defined and that they would be interpreted subjectively, or used by the Forest Service to abuse the process. Several respondents suggested that the reasons for dismissal should be documented and that the decision to dismiss should be subject to discretionary review.

Response: The Forest Service agrees. As is the current practice. the agency will require a Reviewing Officer to document the reasons for dismissal in a decision letter. The omission of language to this effect in the proposed rule was an oversight. The final rule has been amended to direct the Reviewing Officer to provide written notice of a dismissal including an explanation of why the appeal is dismissed. And. on the basis of fairness and objectivity of review. the final rule has been modified to provide discretionary review of dismissal decisions. The final language cross-references new paragraph § 217.7(d) for clarification.

We believe the rule clearly defines the circumstances under which an appeal will be dismissed. and no modification is required.

This section is recoded § 217.11 and retitled "Dismissal without review."

Section 217.17 Resolution of issues during review.

The proposal made explicit the ability of the Deciding Officer to negotiate with those challenging a decision through the review process. and for Reviewing Officer to extend time for doing so. The proposed rule also provided that Deciding Officers could withdraw their initial decisions.

Comments. Some respondents were skeptical about and others opposed to the concept of seeking issue resolution after an appeal had been filed. They were concerned about compromising professional integrity and causing long delays in projects. Others were concerned that the Forest Service would use the resolution process to suspend action on an appeal. while allowing Forest plan direction to be implemented.

Most of the comments received supported the idea of a negotiated settlement. and offered additional suggestions. One respondent felt that the proposal would be strengthened by adding from 36 CFR Part 251 the mandatory "invitation to meet" language now required in decision letters to instrument holders. Several respondents were worried that the extension of deadlines would be abused. and unreasonable delays would occur. Suggestions included adding a definite time period to accomplish the negotiations; stipulating that the requester. Deciding Officer. Reviewing Officer. and other affected parties must agree to any extensions.

Additional concerns were expressed about communications during negotiations. Several respondents suggested that all affected parties be invited to participate in the negotiations. Because in the past some respondents had experienced a reluctance from the Forest Service to negotiate. several suggested that appellants. or even Reviewing Officers. should be able to request a negotiation session. not just the Deciding Officer.

Response: The Forest Service considered including the "invitation to meet" language from proposed 36 CFR Part 251 in proposed 36 CFR Part 217. However. it was not included because who might appeal is not known at the time a decision is recorded. Instead. the idea behind the "invitation to meet" proposed in 36 CFR Part 251 is embodied in this section and gives the Deciding Officer encouragement to meet with appellants and intervenors during the process to resolve issues. However. we agree that extensions of time to permit negotiations to occur should not be open ended. The final rule requires the Reviewing Officer to establish a reasonable duration. To require all parties to agree to any extensions is impractical. and in many cases an unlikely prospect. Some participants may be willing to work out solutions. and this prospect is more important than requiring all parties to agree to extensions. Therefore. this condition is not included in the final rule. The agency concurs with those respondents expressing concern about overcoming a reluctance to negotiate. There are some Forest Service officers who prefer a more structured appeals process rather than an informal negotiation process. Therefore. the final rule language is modified to allow Deciding Officers. Reviewing Officers. appellants. and intervenors to request meetings to resolve issues. However, to preserve a Reviewing Officer's independence and objectivity should settlement not occur, the final rule provides that even though the Reviewing Officer may request that a meeting be held, Reviewing Officers may not participate in negotiations with appellants and/or intervenors, a limitation which overcomes problems associated with *ex parte* communications.

This section is recoded § 217.12, and retitled "Resolution of issues."

Section 217.18 Policy in event of judicial proceedings.

This section in the proposed rule created no new policy; it merely articulated longstanding practice consistent with judicial precedent favoring completion of the administrative process prior to court involvement.

Comments: The comments on this issue were few but emphatic. Respondents criticized the proposed language in other parts of the rule that would limit the kind of information included in the record or available to parties to the appeal, i.e., undocumented conversations or other information not shared with parties to the appeal. Absent an equitable procedure for sharing information, an inadequate administrative record is the result. Therefore, exhaustion of the administrative procedures in 36 CFR Part 217 should not be required of appellants as a prerequisite to direct access to court, because a court would not limit itself to an inadequate administrative record. Respondents also expressed concern that the Forest Service could frustrate appellants' access to court by delaying decisionmaking through manipulating extensions of time.

Response: As discussed in § 217.14, the final rule has been modified to make it clear that it is the information sought by the Reviewing Officer that must be documented and shared with all participants with opportunity for comment provided. The Forest Service believes that this clarification in the final rule resolves the concern. Therefore, this section is retained. However, it has been modified to permit the Chief to waive the policy on a case-by-case basis.

General Comment on Proposed Rule 36 CFR Part 251

Much less comment was received about this rule than the proposal for 36 CFR Part 217. However, the comment generally centered around the same major concerns expressed about 36 CFR Part 217, and most of it appeared to be from individuals and organizations who would not be eligible to utilize this rule.

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 251, Subpart C, and the Department's response to these comments. Many respondents felt that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process, and the headings have been retitled to better describe their contents. However, comments are keyed to the section numbers and headings of the proposed rule document.

Section 251.80 Purpose and scope.

The proposed rule asserted that it established a fair and deliberate process for appealing and reviewing written decisions arising from the issuance, approval, and administration of written instruments that authorize the occupancy and use of National Forest System land.

Comments: Those commenting on this section focused on the unfairness of two rules. They said it was inconsistent with the tenets of due process as well as unworkable. They also voiced concerns because it does not provide for an impartial judge. Others were concerned because they already feel they are in a weak bargaining position with the Forest Service and that this rule will make it worse.

Response: The agency disagrees that this rule is inconsistent with the tenets of due process. In fact, this rule is a structured, grievance-oriented rule that provides the elements of due process that are fundamental to resolving issues that arise from a business or legal relationship between the Forest Service and an appellant. It is quite similar in this respect to the current rule, 36 CFR 211.18. As pointed out in the discussion of Options Considered in the proposed rule document, the agency considered an independent board or impartial judge. However, this idea was rejected because such a formalized process may intensify adversarial relationships with the agency. Such a relationship is counter to the Forest Service commitment and desire to increase communication and cooperation with the public. In addition, the independent board or judge approach to appeal administration would tend to erode the agency's statutory authority to administer its programs and to supervise, correct, or redirect its operations. Therefore, the final rule remains an internal administrative appeal procedure.

The final rule retains this section, as proposed.

Section 251.81 Applicability and effective date.

This section would allow for the continuance of appeals related to written instruments that have already been brought under the current rule: 36 CFR 211.18, 36 CFR 228.14, or 36 CFR 292.15. No comments were received. The final rule retains this section as proposed; however, it is recoded as § 251.102.

Section 251.82 Definitions and terminology.

This section defines the terms used in this subpart. No comments were received. The final rule retains this section as proposed, however, it is recoded as § 251 81.

Section 251.83 Parties eligible to participate.

The rule proposed three types of parties eligible to participate: (1) Appellants—that is a holder of a written instrument or authorization or an applicant who is applying for an authorization in response to a solicitation by the Forest Service; (2) intervenors—other applicants for the same authorization, or holders of similar authorizations who have a direct interest that could be directly impacted by the appeal decision; and (3) the Deciding Officer.

Comments: There were many comments voiced about eligibility. Some respondents said it was too narrow as to who was eligible because it didn't apply to all applicants, and that it prevents adjacent landowners from appealing issuance of permits for activities which would have a negative environmental impact on their lands. Some respondents believed that States should have an opportunity to appeal or intervene. Others suggested allowing groups to intervene who supported either the permittee or appellant or those who would be affected by the appeal decision.

Response: The limitations on who can appeal and intervene are essential to this rule, because it is designed only to resolve issues arising from a decision to issue or approve, to deny issuance or approval, or to administer an existing authorization. These persons have a business or legal relationship with the Forest Service by virtue of the application for or the holding of a written instrument, and because of that relationship must have a procedure for bringing and resolving grievances.

Those who object to the use of the lands or resources to be covered by the issuance of an authorization can request review of the basic decision under 36

CFR Part 217 if this basic decision involves documentation required by agency planning and environmental analysis procedures. In addition, the initial allocation decision made through Forest level planning is reviewable under 36 CFR Part 217.

Therefore, this section has been retained in its entirety and is recoded § 251.86 and retitled Parties.

Section 251.84 Appealable decisions.

This section of the proposed rule lists the written decisions arising from specific types of permitted uses of National Forest System lands that can be appealed. The decisions vary from approval of grazing of livestock to approvals of special use permits. The approval of plans of mining operations pursuant to 36 CFR Part 228 and 36 CFR 292.17 and 292.18 would be added to the list of appealable decisions, ending previous separate processes. It also gives instructions for how notice of decisions appealable under this rule will be given.

Comments: Comments on this section generally dealt with specific questions on different types of decisions and whether or not they were appealable under this rule. For instance, Memorandums of Understanding (MOU), purchases of forest lands under 16 U.S.C. 521c–521i; decisions not to proceed with exchanges and disapproval of surface use plans. Other comments included questions about which rule would govern if a permit action triggered a NEPA review, and why notices of decision were sent only to applicants or holders and not to other National Forest users. One respondent suggested making the list of instruments non-inclusive so that future ones could be included.

Response: If the decision on an MOU is recorded through NEPA procedures, the decision is appealable under the procedures outlined in 36 CFR Part 217. However, later action under the MOU would be appealable by the holder of a permit under 36 CFR Part 251.

Section 251.86 of the proposed rule speaks to those situations where a decision could be appealed under both rules. An appellant eligible to appeal under either rule must choose which review process will be used and forfeits all right to use the other process.

Decisions covered under 16 U.S.C. 521c–521i usually entail NEPA compliance and, therefore, would be appealable under 36 CFR Part 217. We agree that decisions not to proceed with an exchange or disapproval of a surface use plan should also be listed. We also agree with the suggestion that the list be non-inclusive. The final rule language has been revised to include both of these items.

Because the matter under appeal is between the Forest Service and the holder of a permit or an applicant for a permit, extensive public notice requirements are not necessary unless the action involved NEPA, in which case the notice requirements of 36 CFR Part 217 must be met. A new section is added to the final rule, § 251.84 Obtaining notice, and the language about notice in proposed § 251.84 has been incorporated in this new section. The final rule clarifies that prompt notice is required. Also, this section is recoded § 251.82.

Section 251.85 Decisions not appealable under this subpart.

This section excludes from appeal the same decisions that are currently excluded under 36 CFR 211.18. In addition, it updates the list to reflect the enforcement of Uniform Rules for Protection of Archaeological Resources at 36 CFR Part 296, orders related to 36 CFR Part 261, decisions related to rehabilitation of National Forest System lands resulting from natural catastrophes if a Regional Forester or the Chief gives notice in the Federal Register, and decisions covered by 36 CFR Part 217.

Comments: Comments on this section generally addressed the exclusion of decisions related to rehabilitation for National Forest System lands resulting from natural catastrophes. Some respondents expressed the opinion that it is unnecessary to list these as exclusions since the Regional Forester or Chief would exclude them via Federal Register notice. Other respondents said the rule (§ 251.85(k)) was unclear concerning which NEPA decisions were appealable and which were excluded.

Response: The agency expects most decisions resulting from natural catastrophes will not be excluded except under extraordinary circumstances. In any event, a decision to exclude does not excuse the Regional Forester or Chief from NEPA compliance on the rehabilitation decision. A holder of a written instrument or an applicant could appeal under 36 CFR Part 251 or 36 CFR Part 217 depending on how the decision affects them. Therefore, it is appropriate to have the rehabilitation exclusion proviso in this section, and the final rule retains it.

Paragraph (k) refers to intermediate decisions. This exclusion continues current practice. Only the final decision, as documented in a Record of Decision, Decision Notice, or Decision Memo is appealable under 36 CFR Part 217, except as provided for at 36 CFR 251.86. The final rule retains this exclusion.

This section is recoded as § 251.83, and retitled Decisions not appealable.

Section 251.86 Election of appropriate review procedure.

This section covers those instances when a decision might be appealable under this rule as well as reviewable under Part 217. It requires the appellant to choose the appropriate review process, and further advises that an appellant thereby forfeits all right to use the other process for that decision.

Comments: Respondents on this section questioned the likelihood of the same decision being appealable and reviewable under both rules. They voiced the opinion that it just complicates the process and doubted its usefulness. Others suggested permitting participation under 36 CFR Part 217 even if an appellant has elected appeal under 36 CFR Part 251.

Response: It is possible that a decision could be made that is both appealable under this rule and reviewable under 36 CFR Part 217, but it should be a fairly rare circumstance. Therefore, this procedure is necessary. The choice of formal or informal review should be the applicant's or instrument holder's choice to make, not the Forest Service's choice. However, the final rule now includes a provision for appellants under this rule to participate in a review being conducted under 36 CFR 217.6(b).

The final rule retains this section but recodes it as § 251.85, retitled "Election of appeal process."

Section 251.87 Levels of review available.

The proposed rule change offers one level of appeal but makes the second level of review at the discretion of that officer.

Comments: Many respondents objected to the concept of a one-level appeal process in this rule for the same reasons outlined in the section discussing the public comment received on 36 CFR Part 217. Therefore, the discussion is not repeated here.

Response: Similarly, and consistent with the final rule at 36 CFR Part 217, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level appeal of a Ranger Decision by the Regional Forester will not be automatic. The appellant will have to request it; the review will be based solely on the existing record without any additional submissions; and, the second level decision will not receive further review.

Also consistent with the changes at 36 CFR Part 217, dismissal decisions will be subject to discretionary review. A new paragraph (d) was added in the final rule to clarify this change.

The provisions detailing how discretionary review will work has been moved to a new section, § 251.100 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 251.87, 251.89, 251.94, 251.97, 251.98, and 251.99. The comments on discretionary review are further responded to under § 251.99 Appeal decision.

Section 251.88 Filing procedures and timeliness.

The procedures of this section are different from the current rule in two notable ways. One, under the proposed rule, an appellant would file an appeal with the Reviewing Officer instead of the Deciding Officer. Second, the filing period which would end 45 days from the date of the written decision, is not extendable, and timeliness decisions are not subject to appeal.

Comments: Comments received on this section questioned the appeal period beginning on the date the decision is signed. They felt it should begin after the appellant receives the decision. They went on to say that the agency should use Certified Mail to establish this date and to establish timely filing by the appellant. Other respondents questioned whether it was the postmark or receipt at the designated office that established timely filing.

Some respondents perceived that the filing period had been shortened and asserted that the possibility for time extensions must be included along with extending the 20-day period appellants have to reply to the Responsive Statement.

Response: The only date the Forest Service can control is the date of the decision. It would be extremely confusing for everyone concerned to have differing dates should there be multiple appeals. Furthermore, the proposed language follows current practice. Using Certified Mail to establish the date does not guarantee the party will receive it in a timely manner, and, therefore, the appeal period might never begin for that party. Current practice by the Forest Service is to send appeal related correspondence via certified mail within a day of the decision. The proposed rule does not preclude Forest officers from continuing this practice. The agency cannot require appellants to use certified mail. As in current practice, timely filing will be ascertained by the postmarked date if the documents are mailed, or delivery date if others means are used.

The proposed rule language provided for the same length of time to file a first level appeal as the current appeal rule.

The discussion that follows on § 251.89 addresses the concerns voiced on time extensions.

This section is retitled "Filing procedures." A flow chart of the process will be set out at the end of this document as Appendix B, but it will not appear in the Code of Federal Regulations.

Section 251.89 Extension of time.

This section would give a Reviewing Officer the discretion to extend all time lines expressed in the rule except the time to file a notice of appeal and for discretionary reviews of appeal decisions.

Comments: The only comment received on this section urged that instead of granting time extensions, both parties be placed on a rigid time table. It was suggested that if the appellant fails to meet any of the time lines, the Forest Service decision should stand; and if the Forest Service fails to meet any of the time lines, the appellant should prevail and the decision be changed to reflect the relief requested in the appellant's notice of appeal.

Response: The agency believes there are instances involving written instrument authorizations when extenuating cirumstances prevail and extending the time lines is necessary and appropriate. Therefore, the final rule retains the language from the proposal. It is retitled "Time extensions."

Section 251.90 Notice of appeal content.

The proposed rule made clear that the appellant bears the burden of proof in their notice of appeal as to why a decision should be changed. It included a detailed list of information to be provided by the appellant.

Comments: Those commenting on this section focused on three areas of concern. First, the fact that the Statement of Reasons must accompany the Notice of Appeal and the time provided was insufficient to prepare all this information; second, that there is no provision for correcting deficiencies; and last, there is no provision for notifying Deciding Officers about receipt of an appeal so their preparation of the Responsive Statement can begin.

Response: The agency believes that the time provided is adequate. Most matters involving written instrument will be relatively straight forward and will not require additional time. The rules, as proposed, did not prohibit correcting deficiencies or augmenting initial submissions with additional submissions. As is the current practice, however, if additional information is submitted for the record, it must be shared with all parties in a timely manner that will allow them time for comment prior to the record closing.

The proposed rule did require simultaneous filing of an appeal with the Deciding Officer in § 251.89. This triggers the Deciding Officer's preparation of the Responsive Statement.

The final rule retains the proposed language; however, it is retitled "Content of notice of appeal."

Section 251.91 Responsive statement.

The proposed rule retains the features of the current rule with regard to responsive statements. A Deciding Officer must prepare the Responsive Statement within 30 days and send to the appellant a statement responding to the facts, or issues of law or regulation alleged by an appellant. A copy must also be sent to any intervenors. All parties have 20 days to reply to the Responsive Statement.

Comments: Those comments addressing this section were concerned with two areas. First, that only permittees received a copy of the responsive statement and not the public. Second, that the 20-day time period to comment on the responsive statement is tied to the postmarked date of the responsive statement rather than the day it is received.

Response: It is fundamental to this rule that parties to the appeal be apprised of information submitted to the record and provided an opportunity to reply to the information. Because the public is not a party to the appeal, they are not entitled to receive a copy of the responsive statement. This is consistent with the current rule.

The only date the Forest Service can control is the date it is mailed. It is not practicable to use the receipt date. Therefore, the final rule retains the proposed language. However, it is recoded and retitled, § 251.94 Responsive statement.

Section 251.92 Implementation and request for stay of implementation.

The proposed rule allowed implementation of a decision under appeal unless a stay is requested and granted. This section incorporates most of the content requirements of the existing rule for requesting a stay.

Comments: There were two differing opinions expressed on this section. Some respondents felt that it should be deleted altogether because most stay requests are frivolous and used as a delay tactic. The other respondents voiced the opinion that stays should be granted automatically.

Response: Decisions appealable under this rule involve holders and certain applicants who enjoy a business or legal relationship with the Forest Service. This provision is needed to ensure that the appeal is not mooted by implementation of the decision prior to review of the disputed decision. The agency does not believe that most stay requests filed pursuant to the current rule are frivolous. By their very nature, a stay is a delaying mechanism. However, as noted above, it is a necessary one.

The final rule retains the language as proposed but combines this section with §§ 251.93 and 251.94. The combined sections are recoded and retitled as § 251.91 Stays.

Section 251.93 Ruling on stay requests.

This section, as proposed, permits the Reviewing Officer to deny a stay if the decision appealed is not scheduled to take effect during pendency of the appeal. The section also requires the Reviewing Officer to rule on stay requests within 10 calendar days from receipt, and also lists the criteria a Reviewing Officer shall consider in ruling on stay requests. And, as is the current practice, the proposed rule required the Reviewing Officer to issue a written decision and specified the content of the decision letter, depending on the decision.

Comments: The only comment on this section voiced concern that the language in paragraph (b) could expose the Forest Service to charges of being arbitrary. Without elaborating, the contention appears to be based on respondent's view that § 251.93(b) gives blanket authority for denial, while § 251.92 requires appellants to justify a stay request.

Response: The agency has reviewed the proposed language and does not agree that paragraph (b) could be considered arbitrary. It is a signal to appellants to utilize the stay procedures judiciously and not to clog the process with meaningless requests. As discussed in the preamble to the proposed rule, the purpose of a stay is to delay implementation of a decision under appeal if harmful effects to the appellant could occur during pendency of the appeal. It makes no sense to process paperwork for decisions that will not take effect until after the appeal decision is rendered. Thus, the final rule modifies the provision for denial of a stay where implementation is not imminent to say that the Reviewing Officer will not accept such requests. And, for consistency with providing two levels of review on District Ranger decisions, the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request.

The final rule combines this section with §§ 251.92 and 251.94. The combined section is retitled "Stays" and coded as § 251.91.

Section 251.94 Duration of and changes to stay decisions.

The proposed language establishes that stays will remain in effect during the 15-day period for determining discretionary review. Further, a Reviewing Officer may change a stay decision at any time that circumstances support a change. Petitions to change will also be accepted. Stay decisions or changes thereto are not appealable. No comments on this section were received. The final rule retains the language as proposed but incorporates it in § 251.91 Stays.

Section 251.95 Intervention.

Under the proposed rule, intervention would be limited to applicants for or holders of a written instrument of the same or a similar type that is the subject of or affected by the appeal, and have an interest that could be directly affected by an appeal decision. Intervenors would not be able to continue an appeal if the appellant withdraws the appeal.

Comments: Two areas of concern were surfaced from those commenting on this section. Many respondents believed that the proposal was too limiting as to who could intervene. Some believed that anyone with an immediate interest or affected by the decision should be allowed to intervene. Other respondents said the proposal prevented organizations from intervening on behalf of holders.

The other area of concern was continuance of an appeal. Respondents believed that they have the right to continue an appeal even if the appellant withdraws.

Response: The proposed rule is limited, by virtue of a written instrument, to those persons who have a business or legal relationship with the Forest Service that is established by the instrument. It is, therefore, appropriate and necessary to limit the basis for intervention in an appeal under the proposed rule to parties who have a similar relationship that could be affected by the disputed decision. In many instances, the decision to grant or to deny a particular use of lands or resources under a written instrument may be preceded by environmental analysis and documented pursuant to agency planning and decision making procedures (36 CFR Part 219 and 40 CFR Parts 1500 through 1508 and associated implementing regulations). Consequently, the general public has opportunity at this point to appeal under 36 CFR Part 217.

Since an intervenor would not be a party to an appeal unless an appellant had appealed, it is only logical that there is no further standing for an intervenor to carry on an appeal mooted by withdrawal. Intervenors are defined as those having an interest that could be directly affected by the decision on the appeal. If there is no appeal decision because the appeal is withdrawn, there is no effect on the intervenor.

Therefore, the final rule retains the language proposed. The section is recoded § 251.96.

Section 251.96 Oral presentations.

The proposed rule established the purpose of the oral presentation and that they can be held either in person or by phone. A request for an oral presentation that accompanies a notice of appeal would be granted automatically; requests received later would also be considered but the decision to grant the request would be discretionary. Decisions on oral presentation requests would not be appealable.

Appellant and intervenors must bear any expense in attending an oral presentation. And, the presentation may be open to public attendance, but to participation, at the Reviewing Officer's discretion.

Comments: Respondents on this section voiced a concern that parties must bear any expense of participation. Some suggested that the oral presentation should take place as close to the site involved as possible while others suggested making oral presentations discretionary.

Respondents also found unacceptable the option for public attendance at the oral presentation.

Response: While the agency is sympathetic, the Government cannot assume costs for either conference calls or transportation associated with an oral presentation, except on its own behalf. Neither is the Forest Service required to arrange an oral presentation at a location or in a manner that is disadvantageous to the Government. Moreover, the proposal is consistent with current practice.

Practice under the current rule usually limits attendance to the parties involved in the appeal; however, members of the general public sometimes request, and receive, permission to attend at the discretion of the Reviewing Officer. The proposal incorporated this policy. Because the appeal process is an open process, this provision is retained in the final rule. The remainder of this section is also retained without change in the final rule; however, the section is recoded § 251.97.

Section 251.97 Authority of reviewing officer in conduct of appeal.

This section would authorize the Reviewing Officer to establish whatever procedures are necessary to ensure an orderly, expeditious, and fair conduct of an appeal. Such procedural matters would not be subject to appeal and further review. The proposal retains the current provision allowing a Reviewing Office to consolidate appeals. The proposed rule also makes clear that the Reviewing Officer may ask for additional information from any party to an appeal, but all parties must be notified of the request and receive copies of any information supplied. This section stipulates that an appeal of a Chief's initial decision conducted by the Secretary would be subject to the same rules and procedures applicable to all other first level appeals. This section also addresses procedures applicable to conduct of discretionary reviews.

Comments: Respondents commented on two segments of this section: consolidation, and acquiring additional information. Most respondents commenting on consolidation were concerned with having no recourse to opposing consolidation. One respondent suggested that this section provide for consolidation of appeals/reviews proceeding simultaneously under Parts 251 and 217. Others suggested that appellants should also be able to request consolidation.

Some respondents suggested that any additional information sought by the Reviewing Officer should be limited to information existing at the time of the initial decision. Other respondents commented that if adequate documentation did not exist for the original decision when it was made, the decision should be canceled rather than seeking additional information. Some respondents also expressed confusion about requirements for sharing acquired information.

Response: As is the practice currently, appellants may register their opposition to consolidation. Experience shows consolidation of multiple appeals of the same or similar decision is a useful procedure to simplify paperwork. And, the proposed language follows a longstanding practice currently permitted by the present rule. Appellants are seldom in a position to know when consolidation is appropriate. However, incorporating the results of a separate review of the same decision under Part 217 and an appeal under Part 251 into one decision is a good idea. As discussed in the corresponding section of Part 217, the final rule has been modified to permit this at the discretion of the Reviewing Officer.

The provision for acquiring additional information does not imply that the Reviewing Officer could seek information that was not available to the Deciding Officer when the decision was made. The final rule clarifies that additional information sought by the Reviewing Officer is solely for clarifying issues.

This section is recoded as § 251.95 and retitled "Authority of Reviewing Officer." Additionally, the portions discussing discretionary review have been incorporated into a new section devoted exclusively to discretionary review at § 251.100.

Section 251.98 Appeal record.

This section defines what constitutes the appeal record at both the first level and discretionary level of review. Additionally, this section prohibits reopening the record at the discretionary level except when the Secretary reviews an initial decision of the Chief.

Comments: The respondents to this section questioned whether the record would be available and all actions documented.

Response: The proposed rule language makes clear that the appeal record is open to the public throughout the appeal. Further, it details what the record should contain.

The final rule retains the language as proposed. However, the paragraph discussing discretionary review is moved to the new separate § 251.100.

Section 251.99 Appeal decision.

The proposed rule provided information to the Reviewing Officer on the nature of the decision to be rendered and continued the 30-day timeframe from closure of the record for rendering a decision on the appeal. This section also set a 30-day period for rendering a decision if discretionary review is exercised.

Comments: Respondents to this section expressed concern about discretionary review. Some respondents believe that it gives the reviewer an easy way out and is not responsive to public concerns. Further, some respondents objected to decisions being made on whether or not to exercise discretionary review without explanation being provided to parties.

Some respondents suggested that an extension clause be added to extend the 30-day discretionary review period by 15 days on a priority basis. Other respondents suggested that appellants be given an opportunity to waive the discretionary review.

There were also some respondents who objected to decisions on the merits being made without being given an answer. A few respondents objected to the Forest Service being able to grant itself additional time to render the decision.

Response: The agency would not expect a Reviewing Officer to escape review by letting time expire. As discussed in Part 217, while the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents, it is 5 days more than currently provided at the Chief's level. Thus, it is retained in the final rule. However, a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point, the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt, the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls, including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. While the suggestion for waiver of the discretionary review by the appellant has merit, it increases the paperwork involved. Requesting waiver is not prohibited, so appellants have this option should they wish to use it. If, under the current rule the Secretary chooses not to exercise discretionary review, no explanation of this decision is required or given. The final rule continues this practice, but appellants will be notified. This paragraph of this section has been moved and incorporated in the new section devoted to discretionary review.

Consistent with changes in Part 217, the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. The final rule also includes general criteria for the

Reviewing Officer to consider when contemplating discretionary review. For example, controversy surrounding the decision and potential for litigation.

The agency noted that the proposed rule is confusing about what constitutes "issuing" an appeal decision. Therefore, the final rule clarifies this point and stipulates that it will be mailed.

As explained under § 251.89, the agency believes there are instances involving written instrument authorizations when time extensions are necessary. For example, when a permittee must assemble records that are not readily available. Moreover, the provision for requesting a time extension does apply to both the agency and the appellant. Therefore, the final rule retains this provision.

The remaining sections on dismissal (§ 251.100), resolution of issues (§ 251.101), and judicial proceedings (§ 251.102), did not receive specific comments. However, for consistency with the final rule at 36 CFR 217.11, and in response to comment on the proposal at 36 CFR 217.16, the provision on dismissal is modified to provide that dismissal decisions are subject to discretionary review at the next higher administrative level, is cross-referenced to new paragraph § 251.87(d), and is recoded § 251.92 in the final rule. Resolution of issues is recoded at § 251.93, and Policy in event of judicial proceedings is recoded at § 251.101 and modified similar to § 217.17 to permit the exhaustion policy to be waived by the Chief.

Full attention has been given to the comments received in preparing these final regulations. Therefore, the agency is adopting as a final rule, 36 CFR Part 251, Subpart C and 36 CFR Part 217, with the changes discussed in this preamble and with the necessary conforming amendments to Parts 211 and 228 which are adopted without change from the proposed rule. In addition, the final rule contains a conforming amendment to the rules in Part 292, Subpart C, to make clear that appeals of decisions related to the standards for use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area are subject to the final rules at 36 CFR Part 251.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

Based on both experience and environmental analysis, this final rule would not have a significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and therefore imposes no paperwork burden on the public.

Lists of Subjects

36 CFR Part 211

Administrative practice and procedure, National forests.

36 CFR Part 228

Environmental protection, Mines, National forests, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—right-of-way, Reporting and recordkeeping requirements, Water resources.

36 CFR Part 292

Recreation and recreation uses.

Therefore, for the reasons set forth above, Title 36 of the Code of Federal Regulations is amended as follows:

PART 211—ADMINISTRATION [AMENDED]

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System [Amended]

2. Add a new paragraph (o) to § 211.16 to read as follows:

§ 211.16 Appeal of resource recovery and rehabilitation decisions resulting from natural catastrophes.

* * * * *

(o) *Applicability and effective date.* The procedures of this section shall not apply to any appeal received after February 22, 1989.

3. Amend paragraph (s) of § 211.18 by adding a sentence to the end of the paragraph as follows:

§ 211.18 Appeal of decisions of forest officers.

* * * * *

(s) * * * The procedures of this section shall not apply to any request to appeal filed after February 22, 1989.

4. Add a new Part 217 to read as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS

Sec.
217.1 Purpose and scope.
217.2 Definitions.
217.3 Decisions subject to appeal.
217.4 Decisions not subject to appeal.
217.5 Giving notice of decisions subject to appeal.
217.6 Participants.
217.7 Levels of appeal.
217.8 Appeal process sequence.
217.9 Content of a notice of appeal.
217.10 Stays.
217.11 Dismissal without review.
217.12 Resolution of issues
217.13 Reviewing officer authority.
217.14 Intervention.
217.15 Appeal record.
217.16 Decision.
217.17 Discretionary review.
217.18 Policy in event of judicial proceedings.
217.19 Applicability and effective date.

Authority: 16 U.S.C. 551, 472.

§ 217.1 Purpose and scope.

(a) This subpart provides a process by which a person or organization interested in the management of the National Forest System may obtain review of an intended action by a higher level official. These rules establish who may appeal planned actions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply.

(b) The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System decisionmaking prior to implementation of various decisions. The rules of this subpart complement, but do not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA), and the associated implementing regulations and procedures in 40 CFR Parts 1500 through 1508, 36 CFR Parts 216 and 219, Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15. The rules do not provide an adjudication, grievance-oriented process. Rather, they provide an expeditious, objective review of NEPA derived decisions by an official at the next administrative level.

§ 217.2 Definitions.

For the purposes of this part—

"Appellant" is the term used to refer to a person or organization (or an authorized agent or representative acting on their behalf) filing a notice of appeal under this part.

"Deciding Officer" means the Forest Service line officer who has the delegated authority and responsibility to make the decision being questioned under these rules.

"Decision document" means a written document that a Deciding Officer signs to execute a decision subject to review under this part. Specifically a Record of Decision, a Decision Notice, or Decision Memo.

"Decision documentation" refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, a project file for proposed actions categorically excluded from documentation in an environmental assessment or environmental impact statement, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

"Decision Memo" is a concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement (40 CFR 1508.4).

"Decision Notice" means the written document signed by a Deciding Officer when the decision ws preceded by preparation of an environmental assessment (40 CFR 1508.9).

"Decision review" or "review" is the term used to refer to the process provided in this part by which a higher level officer reviews a decision of a subordinate officer in response to a notice of appeal.

"Forest Service line officer". The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

"Intervenor" is an individual who, or organization that, is interested in or potentially affected by a decision under appeal pursuant to this part, who has made a timely request to intervene in that appeal.

"Notice of appeal" is the written document filed with a Reviewing Officer by one who objects to a decision covered by this part and who requests review by the next higher line officer.

"Participants" include appellants, intervenors, the Deciding Officer, and the Reviewing Officer.

"Record of Decision" is the document signed by a Deciding Officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

"Reviewing Officer" is the line officer one administrative level higher than the Deciding Officer or, in the case of a discretionary review, one level higher than the line officer who issued a first-level appeal decision.

§ 217.3 Decisions subject to appeal.

(a) Except as provided in § 217.4 of this part, written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of the National Environmental Policy Act and the National Forest Management Act, and the implementing regulations, policies, and procedures are subject to appeal under this part.

(1) Only decisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to appeal under this part. Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act or National Forest Management Act processes made prior to release of final plans, guides, and other environmental documents are not appealable until issuance of decision documents.

(2) Forestry research and State and private forestry programs and activity decisions are subject to appeal under this part, if a specific decision is documented pursuant to paragraph (a)(1) of this section, and would be carried out directly on National Forest System lands.

(b) Decisions subject to appeal under this part include, but are not limited to:

(1) Approval, amendment, and revision of a forest land and resource management plan prepared pursuant to 36 CFR Part 219.

(2) Approval, and amendment of a regional guide for forest planning prepared pursuant to 36 CFR 219.8.

(3) Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

(c) Decisions on any of the matters listed in this section made by an authorized subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer to whom the subordinate employee reports.

§ 217.4 Decisions not subject to appeal.

(a) The following decisions are not subject to appeal under this part:

(1) Decisions appealable to the Agriculture Board of Contract Appeals, U.S. Department of Agriculture, under 7 CFR Part 24.

(2) Decisions involving Freeedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(3) Decisions for which the jurisdiction of another Government agency or the Comptroller General supercedes that of the Department of Agriculture.

(4) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendation in question.

(5) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117, Administration of Cooperative or Federal Sustained Yield Units; 7 CFR 21.104, Eligibility for

Relocation Payment or Amount; and 4 CFR Part 21. Bid Protests.

(6) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(7) Decisions concerning contracts under the Federal Property and Administration Services Act of 1949, as amended.

(8) Decisions covered by the Contract Disputes Act.

(9) Decisions involving Agency personnel matters.

(10) Decisions where relief sought is reformation of a contract or award of monetary damages.

(11) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

(12) Decisions embodied in rulemaking promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or in policies and procedures issued in the Forest Service Manual and handbooks (36 CFR Parts 200 and 216).

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or to issue order or violations of prohibitions and orders under 36 CFR Part 261.

(14) Decisions solely affecting the business relationship between the Forest Service and applicants for or holders of written instruments regarding occupancy and use of National Forest System lands except as provided for at 36 CFR 251.82.

(b) In addition to decisions excluded from appeal by paragraph (a) of this section, the Forest Service shall not accept any notice of appeal on subsequent implementing actions that result from the initial decision subject to review under this part as defined at § 217.3(b)(3). For example, an initial decision to offer a timber sale is appealable under this part; subsequent actions to advertise or award that sale are not appealable under this part. A subsequent implementing decision that is documented in a new decision document would be subject to appeal under this part.

§ 217.5 Giving notice of decisions subject to appeal.

(a) For decisions subject to appeal under this part, Deciding Officers shall promptly mail the appropriate decision document (§ 217.3(a)(1)) to those who, in writing, have requested it, and to those who are known to have participated in the decisionmaking process.

(b) In addition to the notice required by paragraph (a) of this section, the Deciding Officer shall promptly publish a notice in the **Federal Register** about decisions that are considered to have effects of national concern, including those types of decisions of national concern made by the Chief that are subject to review under this part.

(c) Responsible officials may provide other forms of notice, including legal notice in newspapers of general circulation, as provided for in 40 CFR 1506.6, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.

§ 217.6 Participants.

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level.

(b) An intervenor as defined in § 217.2 of the subpart.

§ 217.7 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 217.17 of this part.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* Only one level of administrative review is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester.

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by the District Ranger.

(1) The initial appeal is filed with the Forest Supervisor.

(2) The notice of appeal for a second level of review must be filed with the Regional Forester within 15 days of the Forest Supervisor's appeal decision. Upon receiving the appeal, the Regional Forester shall promptly request the first level appeal record from the Forest Supervisor. The review shall be conducted on the existing file and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review, except as provided for in paragraph (e)(3) of this section.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to discretionary review by a higher level officer under the subpart.

§ 217.8 Appeal process sequence.

(a) *Filing procedures.* To appeal a decision under this part, a person or organization must:

(1) File a written notice of appeal in accordance with the provisions of § 217.9 of this part with the next higher line officer.

(2) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(3) File the notice of appeal within 45 days of the date of the decision for project decisions documented in a Decision Memo, Decision Notice, or Record of Decision (§ 217.3).

(4) File the notice of appeal within 90 days of the date of the decision for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decision documented in a Record of Decision.

(b) *Computation of time periods.* (1) The day after the decision date is the first day of the time period for filing. All other time periods applicable to this part are tied to the filing of a notice of appeal and begin on the first day following that filing.

(2) All time periods in this rule are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing a notice of appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(c) *Evidence of timely filing.* It is the responsibility of the appellant to file the notice on or before the last day of the filing period. In the event of question, a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timely filing of the appeal. As provided for in § 217.11, notices of appeal that are late shall be dismissed.

(d) *Time extensions.* (1) The 45-day/90-day filing periods for a notice of appeal are not extendable.

(2) Time extensions are not permitted except as provided in §§ 217.12, 217.13, and 217.17 of this subpart.

(e) *Appeal decision.* Unless time has been extended as provided for in §§ 217.12 and 217.13, the Reviewing Officer shall not exceed the following time periods for rendering an appeal decision:

(1) An appeal of a project decision, not more than 100 days from the date the notice of appeal was filed.

(2) An appeal of a land and resource management plan approval, significant amendment, or revision, or on a programmatic decision documented in a Record of Decision, not more than 160 days from the date the notice of appeal was filed.

(3) A second-level appeal of a District Ranger's decision, not more than 30 days from the date the first-level appeal record was received.

(4) In the event of multiple appeals of the same decision, the appeal decision date shall be calculated from the filing date of the last notice of appeal.

§ 217.9 Content of a notice of appeal.

(a) It is the responsibility of those who appeal a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a written notice of appeal filed with the Reviewing Officer must:

(1) List the name, address, and telephone number of the appellant;

(2) Identify the decision about which the requester objects;

(3) Identify the document in which the decision is contained by title and subject, date of the decision, and name and title of the Deciding Officer.

(4) Identify specifically that portion of the decision or decision document to which the requester objects;

(5) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy; and

(6) Identify the specific change(s) in the decision that the appellant seeks.

§ 217.10 Stays.

(a) Requests to stay the approval of land and resource management plans prepared pursuant to 36 CFR Part 219 shall not be granted. However, requests to stay implementation of a project or activity included in such a plan will be considered as provided for in paragraph (b) of this section.

(b) Where a project or activity would be implemented before an appeal decision could be issued, the Reviewing Officer shall consider written requests to stay implementation of that decision pending completion of the review.

(c) To request a stay of implementation, an appellant must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), intervenor(s), and to the Deciding Officer; and

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped; and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) The Reviewing Officer shall rule on stay requests within 10 days of receipt of a request.

(e) In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(f) A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to the appellant(s), intervenor(s), and the Deciding Officer.

(g) A decision may be implemented during a review unless the Reviewing Officer has granted a stay.

(h) A Reviewing Officer's decision on a request to stay implementation of a project or activity is not subject to discretionary review at the next administrative level, except when the Reviewing Officer is the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 217.11 Dismissal without review.

(a) A Reviewing Officer shall dismiss an appeal and close the appeal record without decision on the merits when:

(1) The notice is not filed within the time specified in § 217.8 of this part;

(2) The requested relief or change cannot be granted under law, fact, or regulation existing when the decision was made.

(3) The notice of appeal fails to meet the minimum requirements of § 217.9 of this part to such an extent that the Reviewing Officer lacks adequate information on which to base a decision;

(4) The decision at issue is being appealed under another administrative proceeding;

(5) The decision is excluded from appeal pursuant to § 217.4 of this part;

(6) The appellant(s) withdraws the appeal; or

(7) The Deciding Officer withdraws the appealed decision.

(b) The Reviewing Officer shall give written notice of a dismissal to all participants that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 217.7(d) of this part.

§ 217.12 Resolution of issues.

(a) When a decision is appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. Reviewing Officers may, on their own initiative, request the Deciding Officer to meet the participants to discuss the appeal and explore opportunities to resolve the issues. However, Reviewing Officers may not participate in such discussions. Reviewing Officers may at the request of the Deciding Officer's, or on their own initiative, extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(b) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all participants to the appeal will be notified that the case is dismissed. A Deciding Officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to appeal under this part.

§ 217.13 Reviewing officer authority.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the appeal process as long as they are in accordance with all the applicable rules and procedures of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) In case of multiple appeals of a decision, the Reviewing Officer may prescribe special procedures as necessary to conduct the review.

(3) All participants shall receive notice of any procedural instructions or decisions governing conduct of an appeal.

(4) Procedural instructions and decisions are not subject to review by higher level officers.

(b) *Consolidation of multiple appeals.* (1) The Reviewing Officer shall determine whether to issue one appeal decision or separate decisions in cases involving multiple notices of appeal under this part, or if the same decision is also under appeal pursuant to 36 CFR Part 251. In the event of a consolidated decision, the Reviewing Officer shall give advance notice to all who have appealed the decision.

(2) Decisions to consolidate an appeal decision are not subject to review by higher level officers.

(c) *Requests for information.* At any time during the appeal process, the Reviewing Officer at the levels specified in § 217.7 (a) and (b) of this part may extend the time periods for review to request additional information from an appellant, intervenor, or the Deciding Officer. Such requests shall be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all participants of such requests and provide them opportunity to comment on the information obtained.

(d) *Conduct of review of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 217.7(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this part.

§ 217.14 Intervention.

(a) For a period not to exceed 20 days following the filing of a first level notice of appeal, the Reviewing Officer shall accept requests to intervene in the appeal from any interested or potentially affected person or organization. Requests to intervene in an appeal at the second level (§ 217.7(c)) or during the discretionary review (§ 217.7(e)) shall not be accepted.

(b) Upon receiving such a request, the Reviewing Officer shall promptly acknowledge the request in writing, and mail the Notice of Appeal to the intervenor.

(c) The Reviewing Officer shall accept into the appeal record written comments about the appeal from an intervenor for a period not to exceed 30 days following acknowledgement of the intervention request (§ 217.14(b)).

(d) Intervenors must concurrently furnish copies of all submissions to the appellant. Failure to provide copies may result in removal of a submission from the appeal record.

(e) An intervenor cannot continue an appeal if the appeal is dismissed (§ 217.11).

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days.

(b) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The Deciding Officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any appeal related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.13 of this part.

(d) It is the responsibility of the Reviewing Officer to maintain in one location a file of documents related to the decision and appeal.

(e) *Closing the record.* (1) In appeals involving intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor or at the end of the 30-day period for providing comments, whichever is the latter date, unless time has been extended as provided for in §§ 217.12 and 217.13.

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the Deciding Officer, unless time has been extended as provided for in §§ 217.12 and 217.13.

(f) The appeal record is open to public inspection at any time during the review.

§ 217.16 Decision.

(a) The Reviewing Officer shall not issue a decision prior to the record closing (§ 217.15(e)).

(b) The Reviewing Officer's decision shall, in whole or in part, affirm or reverse the original decision. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The Reviewing Officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a Reviewing Officer's decision as

11

provided at § 217.7(e), or the Reviewing Officer is a Forest Supervisor, the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and that decision is not subject to further review under this part.

§ 217.17 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.

(b) Within one day following the date of a Forest Supervisor's stay decision (§ 217.10(f)), a dismissal decision (§ 217.11) or an appeal decision (§ 217.16) rendered by a Reviewing Officer, that officer shall forward a copy of the appeal decision and the decision documents (§ 217.2) upon which the appeal is predicated to the next higher officer.

(c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.17(d)), or until the end of the 15-day period provided for a second level appeal of a District Ranger's decision (§ 217.7(c)). If the higher level officer decides to review the Reviewing Officer's decision or a second level appeal is filed, the stay will remain in effect until a decision is issued (§ 217.17(f)), or until the end of the 30-day review period provided in §217.17(g), whichever is less.

(d) The higher level officer shall have 15 days from date of receipt to decide whether or not to review a lower level appeal decision, and may request and use the appeal record in deciding whether or not to review the decision, including decisions to dismiss. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the 15-day period or the additional 5-day period following receipt of the record, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. All participants shall be notified by the discretionary level whether or not the decision will be reviewed.

(e) Where an official exercises the discretion in § 217.7 (d) or (e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer who appeal decision is being reviewed.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to participants that the lower level decision will be reviewed, and shall send a copy of the review decision to all participants.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, the participants shall be notified by the discretionary level.

§ 217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part. This position may be waived upon a written finding by the Chief.

§ 217.19 Applicability and effective date.

(a) The appeal procedures established in this part apply to all notices of appeal filed after February 22, 1989.

(b) Notices of appeal filed under 36 CFR 211.16, 36 CFR 211.18, 36 CFR 228.14, and 36 CFR 292.15 prior to February 22, 1989 remain subject to those procedures.

PART 228—MINERALS [AMENDED]

5. The authority citation for Part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 55), and 94 Stat. 2400.

Subpart A—Locatable Minerals [Amended]

6. Revise § 228.14 to read as follows:

§ 228.14 Appeals

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

PART 251—LAND USES [AMENDED]

7. Add a new Subpart C to read as follows:

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

Sec.
251.80 Purpose and scope.
251.81 Definitions and terminology.
251.82 Appealable decisions.
251.83 Decisions not appealable.
251.84 Obtaining notice.
251.85 Election of appeal process.
251.86 Parties.
251.87 Levels of appeal.
251.88 Filing procedures.
251.89 Time extensions.
251.90 Content of notice of appeal.
251.91 Stays.
251.92 Dismissal.
251.93 Resolution of issues.
251.94 Responsive statement.
251.95 Authority of Reviewing Officer.
251.96 Intervention.
251.97 Oral presentation.
251.98 Appeal record.
251.99 Appeal decision.
251.100 Discretionary review.
251.101 Policy in event of judicial proceedings.
251.102 Applicability and effective date.

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Land

Authority: 16 U.S.C. 472.551.

§ 251.80 Purpose and scope.

(a) This subpart provides a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands, may appeal a written decision by an authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. The rules in the subpart establish who may appeal under these rules, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various procedures and timeframes that will govern the conduct of appeals under this subpart.

(b) The rules in this subpart seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands.

§ 251.81 Definitions and terminology.

For the purposes of this subpart, the following terms are defined:

Appeal. A request to a higher ranking officer for relief from a written decision filed under this subpart by an applicant for or a holder of a written instrument issued or approved by a Forest Service line officer.

Appeal decision. The written decision rendered by the Reviewing Officer on an appeal for relief under this subpart. The use of this term is limited to the final decision of a Reviewing Officer and does not refer to a stay decision or to any other determinations or procedural orders made on the conduct of an appeal (§ 251.99).

Appeal record. The documents submitted to the Reviewing Officer by an appellant, intervenor, or Deciding Officer (§ 251.98).

Appellant. An eligible applicant for or holder of a written instrument issued for the occupancy and use of National Forest System land (or their authorized agent or representative) who files an appeal pursuant to the provisions of this subpart (§ 251.86).

Deciding officer. The Forest Service line officer who makes a decision related to issuance, approval, or administration of an authorization to occupany and use National Forest System lands that is appealed under this subpart.

Decisions regarding a written instrument or authorization to occupy and use National Forest System lands. A broad, all inclusive phrase used throughout this subpart to connote the full range of actions and decisions a forest officer takes to issue written instruments, or to manage authorized uses of National Forest System lands, including, but not limited to, enforcement of terms and conditions, and suspension, cancellation, and/or termination of an authorization.

Forest System line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Intervenor. An individual who, or organization that, is an applicant for or holder of the written instrument, or a similar instrument, issued by the Forest Service that is the subject of an appeal, and who has an interest that could be affected by an appeal, and who has made a timely request to intervene in that appeal, and who has been granted intervenor status by the Reviewing Officer (§ 251.96).

Issuance of a written instrument of authorization. Applies both to decisions to grant and to deny a written instrument or authorization.

Notice of appeal. The document prepared and filed by an appellant to dispute a decision subject to review under this subpart (§ 251.90).

Oral presentation. An informal meeting (in person or by telephone) at which an appellant, intervenor, and/or Deciding Officer may present information related to an appeal to the Reviewing Officer (§ 251.97).

Parties to an appeal. The appellant(s), intervenor(s), and the Deciding Officer.

Responsive statement. A written document prepared by a Deciding Officer that responds to the notice of appeal record by an appellant (§ 251.94).

Reviewing Officer. The officer at the next administrative level above that of the Deciding Officer who conducts appeal proceedings, makes all necessary rulings regarding conduct of an appeal, and issues the appeal decision.

Written instrument or authorization. Any of those kinds of documents listed in § 251.82 of this subpart issued or approved by the Forest Service authorizing an individual, organization or other entity to occupy and use National Forest System lands and resources.

§ 251.82 Appealable decisions.

(a) The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of Title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR Part 222, Subpart A.

(4) Mining plans of operating under 36 CFR Part 228, Subpart A.

(5) Mining operating plans for the Sawtooth National Recreation Area issued under 36 CFR 292.17 and 292.18.

(6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, Subpart C.

(7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR Part 251, Subpart A.

(8) Special use authorizations issued under 36 CFR Part 251, Subpart B, except, as provided in § 251.60(g), for suspension or termination of easements issued pursuant to 36 CFR 251.53(e) and (e)(1).

(9) Land exchange agreements under 36 CFR 254.11 and decisions to proceed/not proceed with land exchanges.

(10) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.

(11) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act 1979 and 36 CFR Part 296.

(12) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(13) Decisions to object, or not to object to the issuance of minerals leases.

(14) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR Part 292, Subpart C.

(b) Written decisions on any of the matters of the type listed in paragraph (a) of this section issued by a Forest Service staff officer with delegated authority to act for a Forest Service line officer are considered to be decisions of the line officer.

§ 251.83 Decisions not appealable.

The following decisions are not appealable under this subpart:

(a) Decisions appealable to the Agriculture Board of Contract Appeals, USDA, under 7 CFR Part 24.

(b) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(c) Decisions for which the jurisdiction of another Government agency, the Comptroller General, or a court to hear and settle disputes supersedes that of the Department of Agriculture.

(d) Recommendations of Forest Service line officers to higher ranking Forest Service line officers or to other entities having final authority to implement the recommendation in question.

(e) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117 (Administration of Cooperative for Federal Sustained Yield Units), 7 CFR 21.104 (Eligibility for Recreation Payment of Amount), and 4 CFR Part 21 (Bid Protests).

(f) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(g) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(h) Decisions covered by the Contract Disputes Act.

(i) Decisions involving Agency personnel matters.

(j) Decisions where relief sought is reformation of a contract or award of monetary damages.

(k) Decisions made during the preliminary planning process pursuant to 36 CFR Part 219 and 40 CFR Parts 1500–1508 that precede decisions to implement the proposed action.

(l) Decisions related to National Forest land and resource management plans and projects only reviewable under 36 CFR Part 217.

(m) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice that good cause exists to exempt such decisions from appeal under this subpart.

(n) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR Part 261.

(o) Reaffirmation of prior decisions to terminate a special use authorization.

§ 251.84 Obtaining notice.

A Deciding Officer shall promptly give written notice of decisions subject to appeal under this subpart to applicants and holders defined in § 251.86 of this subpart and to any holder of like instruments who has made a written request to be notified of a specific decision. The notice shall include a statement of the Deciding Officer's willingness to meet with applicants or holders to hear and discuss any concerns or issues related to the decision (§ 251.93). The notice shall also specify the name of the officer to whom an appeal of the decision may be filed, the address, and the deadline for filing an appeal.

§ 251.85 Election of appeal process.

(a) No decision can be appealed by the same person under both this subpart and Part 217 of this chapter.

(b) Should a decision be reviewable under this subpart as well as Part 217 of this chapter, a party who qualifies to bring an appeal under this subpart can elect which process to use for obtaining review of a decision, but in so doing, the appellant thereby forfeits all right to appeal the same decision under the other review process. However, a holder who waives the right to appeal under the provisions of 36 CFR Part 217 may intervene pursuant to 36 CFR 217.6(b).

§ 251.86 Parties.

Only the following may participate in the appeals process provided under this subpart:

(a) An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, files a formal written request for a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart and

(1) Was denied the authorization, or

(2) Was offered an authorization subject to terms and conditions that the applicant finds unreasonable or impracticable.

(b) The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart who seeks relief from a written decision related to that authorization.

(c) An intervenor as defined in § 251.81 of this subpart.

(d) The Deciding Officer who made the decision being appealed under this subpart.

§ 251.87 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the appeal is to the Secretary of Agriculture. Review by the Secretary is discretionary. Within 15 calendar days of receipt of a timely notice of appeal, the Secretary shall determine whether or not to review the decision. If the Secretary has not decided whether or not to review the decision by the expiration of the 15-day period, the appellant shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 251.100 of this part.

(b) *Decisions made By Forest Supervisors and Regional Foresters.* Only one level of appeal is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available appeal are as follows:

(1) If the decision is made by a Forest Supervisor, the appeal is filed with the Regional Forester.

(2) If the decision is made by a Regional Forester, the appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by District Rangers.

(1) The appeal for initial review is filed with the Forest Supervisor.

(2) The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision. Upon receiving such a request, the Regional Forester shall promptly request the first level file from the Forest Supervisor. The review shall be conducted on the existing record and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 251.92) are subject only to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.

(2) If the Reviewing Officer is Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to further review by a higher level officer under this subpart.

§ 251.88 Filing procedures.

(a) *Filing procedures.* In order to appeal a decision under this subpart, an appellant must:

(1) File a notice of appeal in accordance with § 251.90 of this subpart, with the next higher line officer as identified in § 251.87.

(2) File the notice of appeal within 45 days of the date on the notice of the written decision being appealed (§ 251.84); and

(3) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(b) *Evidence of timely filing.* It is the responsibility of those filing an appeal to file the notice of appeal by the end of the filing period. In the event of questions, legible postmarks will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timeliness of the notice of appeal. Untimely submissions are subject to dismissal as provided for in § 251.92(2).

(c) *Computation of time period for filing*. (1) The time period for filing a notice of appeal of a decision under this subpart begins on the first day after the Deciding Officer's written notice of the decision. All other time periods applicable to this subpart also will be computed to begin on the first day following an event or action related to the appeal.

(2) Time periods applicable to this subpart are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday the filing time is extended to the end of the next Federal working day.

§ 251.89 Time extensions.

(a) *Filing of notice of appeal*. Time for filing a notice of appeal is not extendable.

(b) *All other time periods*. Appellants, Intervenors, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this subpart, unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section, the Reviewing Officer may extend all other time periods under this subpart.

(1) For appeals of initial written decisions by the Chief, a Regional Forester, or a Forest Supervisor, a Reviewing Officer, where good cause exists, may grant a written request for extension of time to file a responsive statement or replies thereto. The Reviewing Officer shall rule on requests for extensions within 10 days of receipt of the request and shall provide written notice of the extension ruling to all parties to the appeal.

(2) Except for discretionary reviews of appeal decisions as provided in § 251.87(d) of this subpart, a Reviewing Officer may extend the time period for issuance of the appeal decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues, as provided in § 251.93 of this subpart.

§ 251.90 Content of notice of appeal.

(a) It is the responsibility of an appellant to provide a Reviewing Officer sufficient narrative evidence and argument to show why a decision by a lower level officer should be reserved or changed.

(b) An appellant must include the following information in a notice of appeal:

(1) The appellant's name, mailing address, and daytime telephone number;

(2) The title or type of written instrument involved, the date of application for or issuance of the written instrument, and the name of the responsible Forest Service Officer;

(3) A brief description and the date of the written decision being appealed;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the facts of the dispute and the issue(s) raised by the appeal;

(6) Specific reference to any law, regulation, or policy that the appellant believes to be violated and that the appellant believes to be violated and the reason for such an allegation;

(7) A statement as to whether and how the appellant has tried to resolve the issue(s) being appealed with the Deciding Officer, the date of any discussion, and the outcome of that meeting or contact; and

(8) A statement of the relief the appellant seeks.

(c) An appellant may also include in the notice of appeal a request for oral presentation (§ 251.97) or a request for stay of implementation of the decision pending on the appeal (§ 251.93).

§ 251.91 Stays.

(a) A decision may be implemented during an appeal unless the Reviewing Officer grants a stay.

(b) An appellant or intervenor may request a stay of a decision at any time while an appeal is pending, if the harmful effects alleged pursuant to paragraph (c)(3) of this section would occur during pendency of the appeal. The Reviewing Officer shall not accept any request to stay implementation of a decision that is not scheduled to begin during pendency of the appeal.

(c) To request a stay of decision, an appellant or intervenor must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), to intervenor(s), and to the Deciding Officer.

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped, and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) A Deciding Officer and other parties to an appeal may provide the Reviewing Officer with a written response to a stay request. A copy of any response must be sent to all parties to the appeal.

(e) *Timeframe*. The Reviewing Officer must rule on a stay request no later than 10 calendar days from receipt.

(f) *Criteria to consider*. In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section including the validity of any claim of adverse effect on the requester;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(g) *Notice of decision on a stay request*. A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to all parties to the appeal.

(h) *Duration*. A stay shall remain in effect for the 15-day period for determining discretionary review (§ 251.100), unless changed by the Reviewing Officer in accordance with paragraph (i) of this section.

(i) *Change in a stay*. A Reviewing Officer may change a stay decision in accordance with any terms established in the stay decision itself or at any time during pendency of an appeal that circumstances support a change of stay. In making any changes to a stay decision, the Reviewing Officer must issue a written notice to all parties to the appeal explaining the reason for making the changes and setting forth any terms or conditions that apply to the change.

(j) *Petitions to change a stay.* An appellant or intervenor may petition a Reviewing Officer to change or lift a stay at any time during the pendency of a stay. Such petitions must be in writing, must explain how circumstances have changed since the stay was imposed, and must state why the change in the stay is being requested. The petitioner must send a copy of the petition to all parties to the appeal.

(k) *Appeal of stay decision or changes in stay.* A Reviewing Officer's decision to grant, deny, lift, or otherwise change a stay is not subject to further appeal and review, except when the first-level Reviewing Officer was the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 251.92 Dismissal.

(a) The Reviewing Officer shall dismiss an appeal and close the record without a decision on the merits when:

(1) The appellant is not eligible to appeal a decision under this subpart.

(2) Appellant's notice of appeal is not filed within the required time period, or the notice of appeal fails to meet the minimum requirements of § 251.90 of this subpart to such an extent that the Reviewing Officer lacks adequate information on which to base a decision.

(3) In cases where there is only one appellant, the appellant withdraws the appeal.

(4) The requested relief cannot be granted under existing law, fact, or regulation.

(5) The decision is excluded from appeal under this subpart (§ 251.83).

(6) The Deciding Officer has withdrawn the decision under appeal.

(7) A request for review of the same decision has been filed by the same person under Part 217 of this Chapter.

(b) The Reviewing Officer shall give written notice of dismissal that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal is subject to discretionary review at the next highest administrative level as provided for in § 251.87(d).

§ 251.93 Resolution of issues.

(a) Authorized Forest Service officers shall, to the extent practicable and consistent with the public interest, consult and meet in person, or by phone, with holders of written instruments prior to issuing written decisions related to administration of a written authorization. The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision.

(b) When decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(c) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing Officer must receive written notice.

§ 251.94 Responsive statement.

(a) *Content.* A responsive statement contains the Deciding Officer's response to the specific facts or issues of law or regulation and the requested relief set forth by the appellant in the notice of appeal.

(b) *Timeframe.* Unless the Reviewing Officer has granted an extension or dismissed the appeal, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal.

(c) *Replies.* Within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer. Appellants and intervenors must send a copy of any reply to a responsive statement to all parties to the appeal, including the Deciding Officer.

§ 251.95 Authority of reviewing officer.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal providing they are consistent with other provisions of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.

(b) *Consolidation of appeals.* A Reviewing Officer may consolidate multiple appeals of the same decision, or of similar decisions involving common issues of fact or law and issue one appeal decision. Similarly, a Reviewing Officer may issue one decision in cases involving separate reviews filed pursuant to 36 CFR Part 217 and under this part when the decision at issue is the same decision. In such case, the Reviewing Officer shall give notice to all parties to multiple appeals.

(1) A decision to consolidate appeals is not subject to appeal and further review.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may prepare one responsive statement to multiple appeals.

(c) *Requests for additional information.* Except in discretionary reviews conducted pursuant to § 251.100 of this subpart, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. Such requests will be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all parties of the request for information, provide it to all parties, give opportunity to comment, and extend time periods if necessary to allow for submission of the information.

(d) *Conduct of appeals of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 251.87(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this subpart.

§ 251.96 Intervention.

(a) A request to intervene in an appeal may be made at any time prior to the closing of the appeal record (§ 251.98) at the first level of appeal (§ 251.87). Requests to intervene in an appeal at the discretionary review level (§ 251.87(d)) shall be denied.

(b) To request intervention in a first-level appeal under this subpart, a party, at a minimum, must:

(1) Submit a written petition to intervene to the Reviewing Officer.

(2) Be, as defined at § 251.81 of this subpart, an applicant for or party to a written instrument issued by the Forest Service that is the subject of or affected by the appeal, and have an interest that could be directly affected by a decision on the appeal, and

(3) Show, in the request for intervention, how the decision on the appeal would directly affect petitioner's interests.

(c) The Reviewing Officer determines whether a party requesting intervention meets the requirements of paragraph (a) of this section. In granting intervention, the Reviewing Officer must give notice to all other parties to the appeal.

(d) A granting or denial of intervention is not subject to appeal to a higher level.

(e) Appellants and intervenors must concurrently furnish copies of all submissions to each other as well as the Deciding Officer. Failure to provide each other copies may result in removal of a submission from the appeal record. At the discretion of the Reviewing Officer, appellants may be given additional time to review and comment on initial submissions by intervenors.

(f) An intervenor cannot continue an appeal if the appellant withdraws the appeal.

§ 251.97 Oral presentation.

(a) *Purpose.* An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal, to present their viewpoints to the Reviewing Officer. The purpose is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.

(b) *Requests.* Only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (§ 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal.

(c) *Participation.* At the discretion of the Reviewing Officer, oral presentations may be open to public attendance, but participation is limited to parties to the appeal. The Reviewing Officer shall advise all parties to the appeal, including the Deciding Officer, of the place, time, and date of the oral presentation, and how the oral presentation will be conducted. All parties to an appeal shall be invited to participate. Appellants and intervenors must bear any expense involved in making an oral presentation in person or by telephone.

(d) *Limitation.* Oral presentations shall be held only at the first level of appeal (§ 251.87(b)).

§ 251.98 Appeal record.

(a) The following rules apply only to the appeal record for appeals at the first level (§ 251.87 (a), (b)):

(1) It is the responsibility of the Reviewing Officer to maintain in one location the documents related to the appeal.

(2) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence.

(3) The Reviewing Officer has discretion to remove from the record documents that were not sent to all parties to an appeal.

(4) Unless the Reviewing Officer has ordered otherwise, the appeal record closes with the expiration of the time period for filing of the reply(ies) to the responsive statement, or at the conclusion of an oral presentation, if there is one. The Reviewing Officer shall notify all parties to an appeal of the closure of the record.

(5) The appeal record is open to public inspection.

§ 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and laws, regulations, orders, policies and procedures in effect at the time the decision was made.

(b) The Reviewing Officer shall affirm or reverse the original decision whole or in part and include the reason(s) for the decision. The Reviewing Officer may also include in the appeal decision instructions for further action by the Deciding Officer.

(c) At the first level of appeal, the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is closed.

(d) At the second level of appeal provided in § 251.87(c), the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is received from the first level Reviewing Officer.

(e) The Reviewing Officer shall send a copy of all appeal decisions to all participants.

(f) Unless the next higher officer exercises the discretion to review an appeal decision as provided in §§ 251.87(e) and 251.100 of this subpart, the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review under this subpart or Part 217 of this chapter.

§ 251.100 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, and whether the appeal decision is precedential in nature or establishes new policy.

(b) Within one day following the date of a dismissal (§ 251.92) or an appeal decision (§ 251.99) is signed by a Reviewing Officer, the Reviewing Officer shall forward a copy of the appeal decision and the initial decision upon which the appeal is predicated to the next higher officer.

(c) The next higher level officer shall have 15 calendar days from date of receipt to decide whether or not to review an appeal decision and may call for or use the appeal record in deciding whether or not to review the appeal decision. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

(d) When an official exercises the discretion in § 251.87(d) or § 251.87(e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer whose appeal decision is being reviewed.

(e) When an official exercises discretion to review an appeal decision, a Reviewing Officer may extend a stay, in whole or in part, during pendency of the discretionary review.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to an appellant that the lower level decision will be reviewed.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified.

(h) The Reviewing Officer shall provide a copy of the decision to all appellants, intervenors, the Deciding Officer, and the lower level Reviewing Officer.

§ 251.101 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this subpart is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the procedures of this subpart. This position may be waived only upon a written finding by the Chief.

§ 251.102 Applicability and effective date.

(a) Except where applicants or holders elect the decision review procedures of Part 217 of this Chapter, all appeals of decisions by applicants or holders arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands as defined at § 251.82 of this subpart shall be subject to the provisions of this subpart as of February 22, 1989.

(b) Appeals of the type covered by this subpart and filed prior to February 22, 1989, shall continue to be conducted under the provisions of 36 CFR 211.18.

PART 292—NATIONAL RECREATION AREAS [AMENDED]

Subpart C—Sawtooth National Recreation Area—Private Lands [Amended]

8. The authority citation for Part 292, Subpart C continues to read as follows:

Authority: Sec. 4(a), Act of Aug. 22, 1972 (86 Stat. 613).

§ 292.15 [Amended]

9. Revise § 292.15(*f*) to read as follows:

* * * * *

(*f*) *Appeals.* Any landowner who is adversely affected by a decision of the Area Ranger under these regulations may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

Date: January 12, 1989.

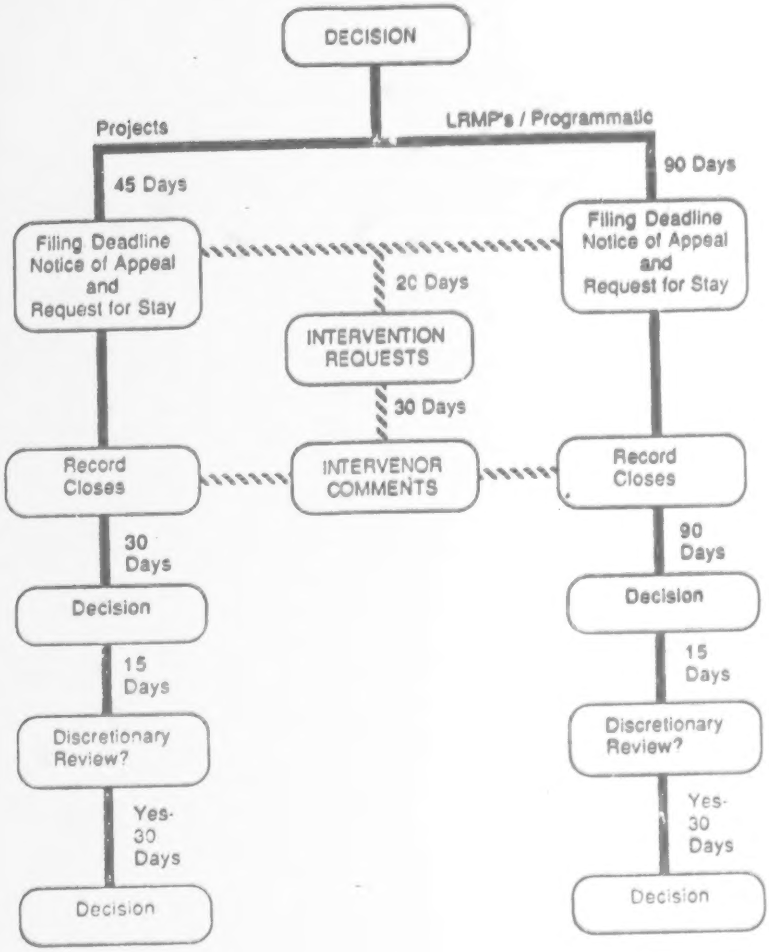
Richard E. Lyng,

Secretary.

Editorial note: These appendices will not appear in the Code of Federal Regulations.

BILLING CODE 3410-11-M

Appendix A - 36 CFR 217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Projects
LRMP's / Programmatic
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90 Days
Filing Deadline Notice of Appeal and Request for Stay
Filing Deadline Notice of Appeal and Request for Stay
20 Days
INTERVENTION REQUESTS
30 Days
Record Closes
INTERVENOR COMMENTS
Record Closes
30 Days
90 Days
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Discretionary Review?
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Yes- 30 Days
Yes- 30 Days
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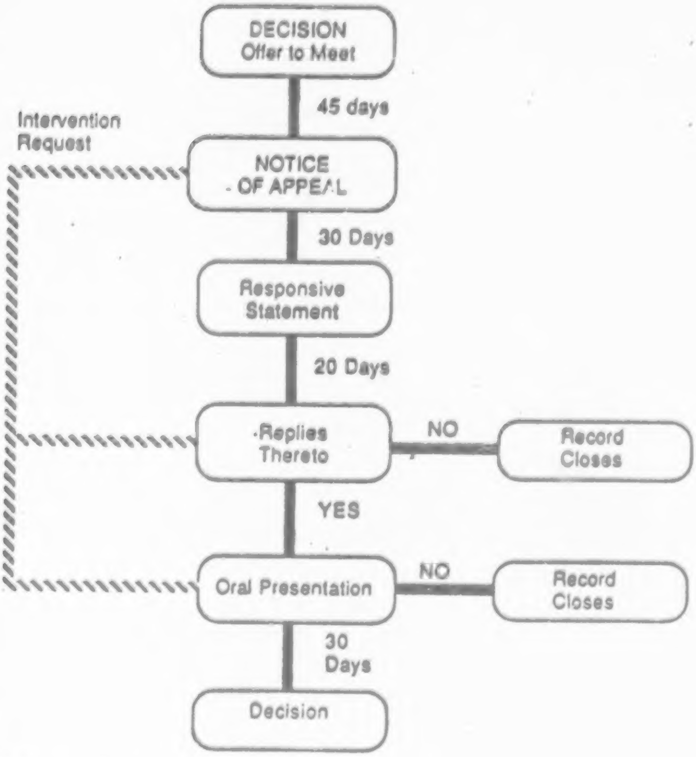
Decision

Appendix B - 36 CFR 251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OF APPEAL
30 Days
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[FR Doc. 89-1222 Filed 1-19-89; 8:45 am]

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92

8-21-89
Vol. 54 No. 160

federal register

Monday
August 21, 1989

Effect of The Garcia Decision

On February 19, 1985, the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority, et al.*, 469 U.S. 528, overruled the *National League of Cities* decision. The court found authority for application of the Fair Labor Standards Act to state and local governments under the Commerce Clause of the Constitution and found that application of federal regulation on the basis of a governmental function being traditional or nontraditional was unsound in principle and unworkable in practice. As a result, classification of state and local governmental functions as traditional or nontraditional became obsolete and unnecessary. Accordingly, 29 CFR Part is amended by deleting §§ 775.2, 775.3 and 775.4.

Publication in Final

The Department of Labor has determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for waiving public comment on this procedural amendment to the regulation because such comment is unnecessary. This finding is made because the changes made herein are necessitated by operation of law as a result of the Supreme Court's reversal of its prior decision in *National League of Cities*.

Regulatory Impact

This document reflects the removal of interpretive or procedural regulations for which there is no current statutory or other legal authority. Therefore this document does not constitute a rule or regulation as defined in Executive Order No. 12291. In addition, this document was not preceded by a general notice of proposed rulemaking, and is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2) and 604(a).

List of Subjects in 29 CFR Part 775

State and local governments, Fair Labor Standards Act.

For the reasons set out in the preamble, 29 CFR Part 775 is amended as set forth below.

Signed at Washington, DC, this 15th day of August, 1989.

Elizabeth Dole,

Secretary of Labor.

PART 775—GENERAL

1. The authority citation for Part 775 is revised to read as follows:

Authority: 52 Stat. 1060, 29 U.S.C. 201 *et seq.*, 61 Stat. 84, 29 U.S.C. 251 *et seq.*, 60 Stat. 3106, 41 U.S.C. 35 *et seq.*

§§ 775.2, 775.3, 775.4 [Removed]

2. 29 CFR Part 775 is amended by removing §§ 775.2, 775.3, and 775.4.

[FR Doc. 89-19521 Filed 8-18-89; 8:45 am]

BILLING CODE 4510-27-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05-89-78]

Special Local Regulations for Marine Events; Thirty-Third Annual Powerboat Regatta, Susquehanna River, Havre de Grace, MD

AGENCY: Coast Guard, DOT.

ACTION: Notice of Implementation of 33 CFR 100.510.

SUMMARY: This notice implements 33 CFR 100.510 for the Thirty-Third Annual Powerboat Regatta. The event will be held on the Susquehanna River, west of Garrett Island. The special local regulations are necessary to control vessel traffic in the immediate vicinity of this event. The effect will be to restrict general navigation in the regulated area for the safety of spectators and participants.

EFFECTIVE DATES: The regulations in 33 CFR 100.510 are effective for the following periods:

11:00 a.m. to 7:00 p.m., August 26, 1989.
11:00 a.m. to 7:00 p.m., August 27, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Billy J. Stephenson, Chief, Boating Affairs Branch, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this notice are Billy J. Stephenson, project officer, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and Captain Michael K. Cain, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Regulations

The Susquehanna River Optimist Club has submitted an application on July 13, 1989 to hold the Thirty-Third Annual Powerboat Regatta on August 26 and 27, 1989, on the Susquehanna River, west of Garrett Island. The powerboat race will consist of approximately seventy five Inboard Hydroplanes, runabouts, and outboard performance crafts ranging from eight to twenty three feet in length racing around an oval course. Three to twelve boats will race at once, at speed up to 140 miles per hour. The races will last from three to four hours. Since this event is of the type contemplated by these regulations and the safety of the participants and spectators viewing this event will be enhanced by the implementation of special local regulations for the Susquehanna River, 33 CFR 100.510 will be in effect. Closure of the entire waterway is not anticipated and marine traffic will be allowed to proceed up the Susquehanna River using that portion of the waterway east of Garrett Island.

These regulations are implemented by publication of this implementing notice in the **Federal Register** and a notice in the Local Notice to Mariners.

Dated: August 11, 1989.

P.A. Welling,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 89-19543 Filed 8-18-89; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 217 and 251

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Final rule; technical amendments and corrections.

SUMMARY: This rule makes corrections and technical amendments to the Forest Service administrative appeal procedures at 36 CFR parts 217 and 251, Subpart C, and corrects typographical errors in the final rules published in the **Federal Register** on January 23, 1989 (54 FR 3342). The changes remove several ambiguities and inconsistencies in the appeal procedures which have been brought to the agency's attention since publication.

EFFECTIVE DATE: This rule is effective August 21, 1989.

FOR FURTHER INFORMATION CONTACT: Kathryn C. Hauser, Program Analyst, National Forest System, Forest Service, U.S. Department of Agriculture, (202) 382–9346.

SUPPLEMENTARY INFORMATION: On January 23, 1989, at 54 FR 3342, part VI, the Secretary of Agriculture gave notice of adoption of two new rules that provide a process for appeal of decisions of Forest Service officials related to management of the National Forest System. The new rules at 36 CFR part 251, subpart C, provide appeal procedures applicable to holders of or applicants for special use authorizations. New rules at 36 CFR part 217 provide a new process for appeal of National Forest System plan and project decisions. The new rules replace the administrative appeal procedures at 36 CFR 211.18. Following publication, the Forest Service discovered several inconsistencies, typographical errors, and omissions that are being corrected by this rulemaking.

Technical Amendments to 36 CFR Part 217

1. Section 217.3

Section 217.3 describes the decisions arising from a National Environmental Policy Act (NEPA) evaluation, and documented in a Record of Decision, Decision Notice, or Decision Memo that are appealable pursuant to this rule. Revision is needed to correct a terminology problem with one of the decisions listed in paragraph (b)(3). The decision in question currently reads: "* * * land exchanges and acquisitions. * * *" Land exchanges involve both disposal of land and the acquisition of land, but it is disposal which inherently results in environmental effects. Acquisitions merely involve transfer of title. Environmental effects are likely to occur only when specific management decisions are implemented concerning the acquired land. Accordingly, paragraph (b)(3) is revised to read, "* * * conveyance of land or interests in land out of Federal ownership. * * *"

2. Section 217.4

The final rule clearly establishes a review process applicable only to decisions arising from analysis required by the National Environmental Policy Act and subsequent implementing regulations and procedures documented in a Record of Decision, Decision Notice, or Decision Memo. Accordingly, appeals of decisions not made through any of these three documents shall not be accepted under 36 CFR part 217. However, while § 217.11 clearly defines the circumstances under which an appeal shall be dismissed, for example decisions excluded from appeal, paragraph (b) of § 217.4, Decisions not subject to appeal, conflicts with this direction. It states that a Reviewing Officer will "not accept" an appeal on subsequent implementing actions. Therefore, paragraph (b) of § 217.4 is being revised to say that appeals of subsequent implementing actions that result from initial decisions subject to review will be dismissed. This revision is consistent with the direction already set out in § 217.11(a)(5).

3. Section 217.7

The proposed regulations published May 16, 1988 (53 FR 17310, Part II), stated the agency's intent to apply the same procedures described for first-level appeals when the Secretary elects to review an initial decision of the Chief. And, the final rule at § 217.13(d) states that if the Secretary elects to review an initial decision, the review shall be conducted in accordance with the applicable rules and procedures of this part. However, § 217.7(a) could be interpreted to contradict this direction because the citation refers only to special procedures involved in discretionary reviews set forth at § 217.17. To ensure that the intent of the rule is achieved and that the Secretary's review of the Chief's initial decisions follows first-level procedures, paragraph (d) of § 217.13, which clearly stated the intent, is being moved to § 217.7(a) and the reference to § 217.17 in § 217.7(a) is being removed. Additionally, consistent with the notification procedures set out in § 217.17, new language has been added to § 217.7(a) to clarify that the discretionary level will notify the appellants when the review at this level is not elected and that the Chief's decision is, therefore, the final administrative decision of the Department of Agriculture.

4. Section 217.8

Part 217 established a review process applicable to all decisions arising from analysis required by the National Environmental Policy Act (NEPA) and subsequent implementing regulations and procedures documented in a Record of Decision, Decision Notice, or Decision Memo. Section 217.8, at paragraphs (a)(3) and (4), delineates the filing times for appeals, differentiating between project decisions, and land and resource management plan approvals, significant amendments, or revisions. Inadvertently, the rule failed to address non-significant amendments to land and resource management plans or programmatic decisions made through an Environmental Assessment and documented in a Decision Notice. This omission has resulted in questions as to whether or not these decisions are appealable and, if so, which filing time applies.

To cure the omission and uncertainty, § 217.8(a)(3) is being amended to provide a 45-day period for filing appeals of non-significant amendments to land and resource management plans documented in a Decision Notice or Decision Memo, or for filing appeals of programmatic decisions documented in a Decision Notice. Neither a non-significant amendment nor a programmatic decision analyzed in an Environmental Assessment and documented in a Decision Notice are as complicated as land and resource management plan approvals, significant amendments, revisions, or other programmatic decisions documented in a Record of Decision. Therefore, 45 days is sufficient time to file an appeal for these kinds of decisions. This change is wholly consistent with the treatment of the 45/90-day period for filing appeals in the final rule. The difference between significant and non-significant amendments to land and resource management plans is explained in Forest Service Manual 1922.5 (51 FR 1476; 53 FR 26807).

5. Section 217.12

One of the fundamental features of the new procedures at part 217 is the emphasis the rules give to conflict resolution. The intent of the new rules, as stated in the preamble (54 FR 3351), is that the rule would allow Deciding Officers, Reviewing Officers, appellants, or intervenors to request meetings to resolve issues. However, through an oversight in § 217.12(a), only Reviewing Officers are specifically authorized to initiate meetings. Therefore, this section is being amended to correct this oversight and conform to the stated intent.

6. Section 217.13

Reviewing Officers are permitted to extend the time periods for review to request additional information needed to clarify issues. However, § 217.13(c) limits this authority to the Secretary of Agriculture, Chief, and Regional Foresters in their capacity as Reviewing Officers. This limitation was an oversight, as Forest Supervisors also need this latitude in first level appeals of District Ranger decisions. Accordingly, § 217.13(c) is being amended to give Forest Supervisors this authority in their capacity as Reviewing Officers.

7. Section 217.15

Procedures for closing the record are set forth in the final rule at § 217.15(e). Paragraph (1) provides that the record will close "* * * upon receipt of comments on the appeal by the intervenor or at the end of the 30-day period for providing comments, whichever is the latter date." The intent of the rule was to close the record upon receipt of intervenor comments on the appeal but not later than the end of the

30-day period intervenors have for providing comments. The rule as written is confusing. Accordingly, § 217.15(e) is amended to clarify that the record closes upon receipt of comments from intervenors but not later than the end of the 30-day comment period.

The final rule at § 217.15 describes the appeal record. It clearly lays out what the record contains, who maintains it, and when it closes. And, § 217.7 clearly states that, if the Secretary elects to review a Chief's initial decision, the first-level appeal procedures outlined in this part apply. Some confusion exists, however, about the handling of the appeal record in the interim, i.e., when an appeal is filed on a Chief's initial decision but prior to the Secretary's determination. Because the creation of the official appeal record would not begin until the Secretary has made the decision to review an initial decision of the Chief (accepted the appeal), nothing filed by an appellant would constitute part of an administrative appeal record until such a determination was made. Accordingly, to clarify this, § 217.15 is revised by adding a new paragraph that makes this point.

8. Section 217.17

Based on inquiries from the public and Forest Service employees, there appears to be some confusion in the new appeal regulation as to whether a Chief's discretionary review decision made pursuant to § 217.17 must be forwarded to the Secretary for possible further discretionary review. The intent of the final rule is clearly stated in the preamble discussion of levels of available review at 54 FR 3348, "* * * the one-level review with discretionary review at the second level best fits the intent of the rule. It simplifies the process, improves the potential to process appeals in a timely manner, yet retains the option for a second review." There was never any intention to offer a second level of discretionary review. Such a process would be inconsistent with the desire to streamline the appeals process. Accordingly, § 217.7(e) is amended to make clear that only one level of discretionary review exists.

The intent of the final rule as discussed in the preamble is to provide a discretionary review for appeal decisions rendered by the Regional Forester and Chief. If discretionary review is exercised, the review is to be conducted solely on the record used by the lower level Reviewing Officer. Paragraph (e) of § 217.17 states that the record will not be reopened to accept additional submissions from parties to the appeal or the Reviewing Officer. This could lead one to conclude that a non-party could submit information to the record. This would be an erroneous conclusion based on the stated intent of the discretionary review level.

Accordingly, paragraph (e) of § 217.17 is being revised to state that the record shall not be reopened to accept additional submissions from any source.

9. Appendix

Section 217.8(e) delineates how long the first-level review process should take: 100 days for projects or 160 days for land and resource management plans or programmatic decisions documented in a Record of Decision. Appendix A—a flow chart of the appeal process under part 217 which is not to be set out in the Code of Federal Regulations—was provided with the final rule to assist the public in understanding the timeframes. Unfortunately, it was confusing. The total number of days shown on the schematic do not add up to 100/160 days because (1) when the rule was finalized, mailing times were built in to the 100-/160-day timeframe; and (2) the schematic erroneously showed either 30 days or 90 days to make a decision after the record closure. These timeframes were replaced in the final rule with the 100-/160-day timeframe. Adding to the confusion over timeframes is an erroneous statement in the preamble that the 90-day timeframe for review is retained in the final rule (54 FR 3351). No changes in the rule itself are required to clarify the timeframes; however, correction of the chart is necessary. Accordingly, a revised Appendix A is published at the end of this rulemaking.

Technical Amendments to 36 CFR Part 251, Subpart C

1. Section 251.82

Review of § 251.82, which lists the written decisions arising from specific types of permitted uses of National Forest System lands that can be appealed, revealed that two of the decisions listed do not comport the purpose and scope of 36 CFR part 251 and therefore should be deleted. The two decisions in § 251.82(a) are: Paragraph (9), "Land exchange agreements under 36 CFR 254.11 and decisions to proceed/not proceed with land exchanges"; and paragraph (13), "Decisions to object, or not to object to the issuance of minerals leases." In both cases the appealable decision is documented in a NEPA-based document and therefore would be appealable pursuant to the procedures set forth in 36 CFR Part 217.

Written agreements on a land exchange come after the actual decision point to proceed or not to proceed and involve only an exchange of title. Additionally, the decision to proceed/not proceed with land exchanges is accomplished through a NEPA analysis documented in a Decision Notice or Rocord of Decision and thus would be appealable pursuant to the procedures set forth in 36 CFR part 217. There are occasions when the Forest Service solicits exchange partners. In such instances, respondents (bidders) to the solicitation are not applying for written authorization to occupy and use National Forest System land. Therefore, no appeal rights under 36 CFR part 251 Subpart C exist for the unsuccessful bidder(s). However, an unsuccessful bidder could appeal pursuant to 36 CFR 217 when a Decision Notice is issued subsequently. If a land exchange decision affects a permit holder, the permit holder has appeal rights pursuant to 36 CFR part 251, subpart C.

Decisions to object/not object to the issuance of minerals leases are also accomplished through a NEPA analysis documented in a Decision Notice or Record of Decision and thus would be appealable pursuant to the procedures set forth in 36 CFR part 217. Even though there are occasions where a person is entitled to apply for a mineral permit or lease and the Forest Service has authority to consent or not to consent to the permit or lease, these decisions are not appealable under 36 CFR part 251, Subpart C because there is no current permit in effect and, therefore, no written authorization establishing a relationship that entitles a party to appeal, as required by 36 CFR 251.86(b); nor is the application the result of a Forest Service solicitation, as required by 36 CFR 251.86(a). Eligibility to appeal under this rule is established when a permit or lease is issued which grants authority to the permittee or lessee to occupy and use NFS lands or when an application is received in response to a Forest Service solicitation (36 CFR 251.86). The applicant for a Bureau of Land Management (BLM) permit or lease will have appeal rights under 36 CFR part 217, because the consent decision forwarded to BLM is accomplished through NEPA analysis and documented in a Record of Decision or Decision Notice.

These changes do not eliminate a person's appeal opportunities. They simply realign them into the proper rule as outlined in the purpose and scope of the respective rules: 36 CFR parts 217 and 251. Accordingly, the rule is amended to reflect these two changes.

2. Section 251.83

The final rule at § 251.83 lists those decisions not subject to appeal under this subpart. Paragraph (o) of that list reads "Reaffirmation of prior decisions to terminate a special use authorization." This exclusion should have read "Reaffirmation of prior decisions." This limitation was an oversight by the agency. Forest Service line officers can be asked to reconsider any decision concerning written authorizations to occupy and use NFS lands, not just decisions to terminate a special use authorization. That officer may review the decision to ensure its continued validity without opening the decision to appeal. If the reconsideration leads to a change in the original decision, the resulting changed decision would be appealable. If there is no change in the original decision, there is no action to appeal. And, if the officer refuses to reconsider a decision, the refusal is not appealable. If this were not the case, there could be no effective time limit on the appealability of decisions. This change is consistent with longstanding guidance in Forest Service Handbook 1509.12 (51 FR 10041). Accordingly, the rule is amended to reflect this change.

3. Section 251.87

Consistent with the revisions to § 217.7 and the stated intention of having the two rules consistent, as appropriate, § 251.87(a) is being revised to make explicit that first level appeal procedures apply when the Secretary elects to review appeals of initial decisions of the Chief. Accordingly, paragraph (d) of § 251.95 is being moved to § 251.87(a), and the reference in § 251.87 to § 251.100 is being removed.

Consistent with the notification procedures set out in § 251.100, language has been added in paragraph (a) of § 251.87 to clarify that the discretionary level will notify the appellants when the review at this level is not elected and that the Chief's decision is, therefore, the final administrative decision of the Department of Agriculture.

4. Section 251.89

The Reviewing Officer is given the discretion to extend most timelines. A contradiction could be construed when reading paragraph (b) of § 251.89 because it states that the Reviewing Officer may extend all other timelines except for filing of a notice of appeal. However, paragraph (b)(2) of the same section states that a Reviewing Officer cannot extend the time period for discretionary review. Therefore, to avoid confusion, paragraph (b) is being revised to bring those two limitations together in the same paragraph. And, the citation to § 251.87(d) in paragraph (b)(2) of § 251.89 is being corrected to cite § 251.100 which is the section that describes the procedures for discretionary review.

5. Section 251.93

Consistent with the stated intent of the rule, the Reviewing Officer has the discretion to extend the timelines to allow for conflict resolution. However, as noted previously, a Reviewing Officer cannot extend the time periods during discretionary review. To avoid any confusion and uncertainty, paragraph (b) § 251.93 is being revised to clearly state that the authority of the Reviewing Officer to extend time periods for review to allow for conduct of meaningful negotiations does not extend to the discretionary review level.

6. Section 251.96

The proposed rule stated that intervention would be limited to applicants for or holders of a written instrument. The discussion in the preamble states that the final rule retains the language proposed. Paragraph (b)(2) of § 251.96 states that in order to intervene, a party must be as defined at § 251.81 "* * * an applicant for or *party* to * * *" [emphasis added]. Use of the words "party to" is inconsistent with the preamble discussion and the definition at § 251.81. Therefore, the reference to "party to" in paragraph (b)(2) of § 251.96 is being changed to "holder of" to ~~make it~~ consistent with the definition in § 251.81.

7. Section 251.98

The final rule at § 251.98 describes the appeal record. It clearly lays out what the record contains, who maintains it, and when it closes. And, § 251.87 clearly states that if the Secretary elects to review a Chief's initial decision that the first level appeal procedures outlined in this part apply. Some confusion exists, however, about the appeal record in the interim, i.e., when an appeal is filed on a Chief's initial decision but prior to the Secretary's determination of whether or not to review a decision of the Chief. Because the creation of the official appeal record would not begin until the Secretary has made the decision to review an initial decision of the Chief (accepted the appeal), nothing filed by an appellant would constitute part of an administrative appeal record until such a determination was made. Accordingly, to clarify this and consistent with a similar change in 36 CFR Part 217, § 251.98 is revised by adding a new paragraph that makes this point.

8. Section 251.99

Whenever an appeal decision is made, the Reviewing Officer's decision must be consistent with applicable law, regulations, and orders. The final rule at paragraph (a) of § 251.99 includes the phrase "* * * in effect at the time the decision was made." This was an error. The intent was that the Reviewing Officer's decision would be consistent with all applicable laws, etc., not limited to only those in effect at the time the decision was made. Accordingly, paragraph (a) § 251.99 is being revised by deleting the phrase "in effect at the time the decision was made." This change is also consistent with the language currently in the corresponding section of 36 CFR part 217.

9. Section 251.100

The final rule sets out at § 251.100 the procedures that will apply to discretionary reviews. However, it fails to state the responsible level for notification about discretionary review. Accordingly, paragraphs (c) and (g) of § 251.100 are revised to say that the discretionary review level will notify. This revision is consistent with the notification procedures in the corresponding section of 36 CFR part 217. Also, in § 251.100, paragraph (d) states that the record will not be reopened to accept additional submissions parties to the appeal or the Reviewing Officer. This could lead one to conclude that a non-party could submit information. This was not the ~~intent. It~~ was intended that the discretionary review be conducted on the same record used by the initial Reviewing Officer. Therefore, paragraph (d) of § 251.100 is being revised to state that the record shall not be reopened to accept additional submissions from any source. This revision is consistent with a similar revision to the corresponding section in 36 CFR part 217.

Corrections

Several typographical errors were found after publication in the Federal Register that cause confusion in the final rules. Errors and corrections are as follows:

1. In § 217.4 Decisions not subject to appeal, paragraph (13) should read "36 CFR 298.15 or violations," eliminating the phrase "to issue order;"

2. In § 217.8 Appeal process sequenc paragraph (a)(4) should read "programmatic decisions" instead of "programmatic decision;"

3. In § 217.17 Discretionary review, t fifth sentence of paragraph (d) incorrectly reads "* * * expiration o the 15-day period or the additional 5-d

period following receipt * * *" It is being corrected to read "* * * or the additional 15-day period following receipt * * *."

4. In § 251.82(a)(4), it should read "Mining plans of operation" not "mining plans of operating."

5. In § 251.90(b)(6) the phrase "that the appellant believes to be violated" appears twice. This paragraph is being corrected to remove the unnecessary verbiage.

6. In § 251.91 Stays, the first sentence of paragraph (j) incorrectly reads "* * * during the pendency of a stay." It is being corrected to read "* * * during the pendency of an appeal."

The revisions in this rulemaking are technical corrections of errors and omissions and do not represent a change in agency policy or intended procedures. They are necessary to ensure that the rule is consistent with the stated intent and to eliminate confusion and ambiguity. Because of their technical nature, this final rule will not have a significant effect on the human environment, individually or cumulatively.

Controlling Paperwork Burdens on the Public

This rulemaking does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and therefore imposes no paperwork burden on the public.

List of Subjects

36 CFR Part 217

Administrative practice and procedure, National forests.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—rights-of-way, Reporting and recordkeeping requirements, Water resources.

Therefore, for the reasons set forth in the preamble, chapter II of title 36 of the Code of Federal Regulations is amended as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 551, 472.

2. Revise § 217.3(b)(3) to read as follows:

§ 217.3 Decisions subject to appeal.

* * * * *

(b)

(3) Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, conveyance of land or interests in land out of Federal ownership, and establishment or expansion of winter sports or other special recreation sites.

* * * * *

3. In § 217.4, revise paragraph (a)(13) and revise the first sentence of paragraph (b) to read as follows:

§ 217.4 Decisions not subject to appeal.

(a) * * *

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR part 261.

* * * * *

(b) In addition to decisions excluded from appeal by paragraph (a) of this section, the Forest Service shall dismiss any notice of appeal on subsequent implementing actions that result from the initial decision subject to review under this part as defined at § 217.3(b)(3). * * *

4. In § 217.7, revise the last two sentences in paragraph (a) and revise the first sentence in paragraphs (d) and (e) respectively to read as follows:

§ 217.7 Levels of appeal.

(a) * * * If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

* * * * *

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to only one level of discretionary review (§ 217.11) as follows: * * *

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to only one level of discretionary review as follows: * * *

5. In § 217.8, revise paragraphs (a)(3) and (a)(4) to read as follows:

§ 217.8 Appeal process sequence.

(a) * * *

(3) File the notice of appeal within [illegible] days of the date of the decision for [illegible] project decisions, non-significant amendments to land and resource management plans documented in a Decision Memo, Decision Notice, or Record of Decision, or programmatic decisions documented in a Decision Notice (§ 217.3).

(4) File the notice of appeal within 90 days of the date of the decision for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions documented in a Record of Decision.

* * * * *

6. In § 217.12, revise the first and last sentences in paragraph (a) to read as follows:

§ 217.12 Resolution of issues.

(a) When a decision is appealed, appellants or intervenors may request meetings with the Deciding Officer to discuss the appeal, either together or separately, to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. * * * Reviewing Officers may, at the request of the Deciding Officer, or on their own initiative, extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

* * * * *

7. In § 217.13, remove paragraph (d) and revise the first sentence of paragraph (c) to read as follows:

§ 217.13 [Amended]

(c) *Requests for information.* At any time during the appeal process, the Reviewing Officer at the levels specified in § 217.7 (a), (b), or (c)(1) of this part may extend the time periods for review to request additional information from an appellant, intervenor, or the Deciding Officer. * * *

8. In § 217.15, revise paragraph (e)(1) and add paragraph (g) to read as follows:

§ 217.15 Appeal record.

* * * * *

(e) *Closing the record.* (1) In appeals with intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor, but not later than the end of the 30-day period provided for intervenors to submit comments (§ 217.14(c)).

* * * * *

(g) In appeals involving initial decisions of the Chief (217.7(a)), the establishment of an administrative record as defined in paragraph (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

9. In § 217.17, revise the fifth sentence of paragraph (d) and the last sentence of paragraph (e) to read as follows:

§ 217.17 Discretionary review.

* * * * *

(d) * * * If that officer takes no action by the expiration of the 15-day period or the additional 15-day period following receipt of the record, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. * * *

(e) * * * The record shall not be reopened to accept additional submissions from any source including the Reviewing Officer whose appeal decision is being reviewed.

* * * * *

PART 251—LAND USES

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

10. The authority citation for Subpart C continues to read as follows:

Authority: 16 U.S.C. 472, 551.

11. In § 251.82, remove paragraphs (a)(9) and (a)(13), redesignate paragraphs (a)(10), (a)(11), (a)(12), and (a)(14) as paragraphs (a)(9) through (a)(12) respectively, and revise paragraph (a)(4) to read as follows:

§ 251.82 Appealable decisions.

(a) * * *

(4) Mining plans of operation under 36 CFR part 228, subpart A.

* * * * *

12. In § 251.83, revise paragraph (o) to read as follows:

§ 251.83 Decisions not appealable.

* * * * *

(o) Reaffirmation of prior decisions.

13. In § 251.87, revise the last two sentences in paragraph (a) and revise the first and second sentences in paragraphs (d) and (e) respectively to read as follows:

§ 251.87 Levels of appeal.

(a) * * * If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

* * * * *

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 251.92) are subject to only one level of discretionary review (§ 251.100) as follows: * * *

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to only one level of discretionary review as follows: * * *

14. In § 251.89 revise the last sentence in paragraph (b) introductory text and the introductory phrase of the first sentence in paragraph (b)(2) to read as follows:

§ 251.89 Time extensions.

* * * * *

(b) * * * Except as noted in paragraph (a) of this section and as prohibited at the discretionary review level (§ 251.100), the Reviewing Officer may extend all other time periods under this subpart. * * *

(2) Except for discretionary reviews of appeal decisions as provided in § 251.100 of this subpart, * * *

15. In § 251.90 revise paragraph (b)(6) to read as follows:

§ 251.90 Content of notice of appeal.

* * * * *

(b) * * *

(6) Specific references to any law, regulation, or policy that the appellant believes to be violated and the reason for such an allegation.

* * * * *

16. In § 251.91 revise the first sentence of paragraph (j) to read as follows:

§ 251.91 Stays.

* * * * *

(j) *Petitions to change a stay.* An appellant or intervenor may petition a Reviewing Officer to change or lift a stay at any time during the pendency of an appeal. * *

* * * * *

17. In § 251.93, revise the last sentence in paragraph (b) to read as follows:

§ 251.93 Resolution of issues.

* * * * *

(b) * * * At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review, except at the discretionary level, and specify a reasonable duration to allow for conduct of meaningful negotiations.

* * * * *

§ 251.95 [Amended]

18. In § 251.95, remove paragraph (d).

§ 251.96 [Amended]

19. In § 251.96(b)(2) change the words "party to" to read "holder of".

20. In § 251.98, remove the paragraph designation (a), redesignate paragraphs (1) through (5) as (a) through (e), and add paragraph (f) to read as follows:

§ 251.98 Appeal record.

* * * * *

(f) In appeals involving initial decisions of the Chief (§ 251.87(a)), the establishment of an administrative record as defined in paragrapn (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

21. In § 251.99, revise paragraph (a) to read as follows:

§ 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and applicable laws, regulations, orders, policies, and procedures.

* * * * *

22. In § 251.100, revise the last sentence of paragraph (c), the last sentence in paragraph (d), and the last sentence of paragraph (g) to read as follows:

§ 251.100 Discretionary review.

* * * * *

(c) * * * If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified by the discretionary level officer that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

(d) * * * The record shall not be reopened to accept additional submissions from any source, including the Reviewing Officer whose appeal decision is being reviewed.

* * * * *

(g) * * * In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified by the discretionary level officer.

* * * * *

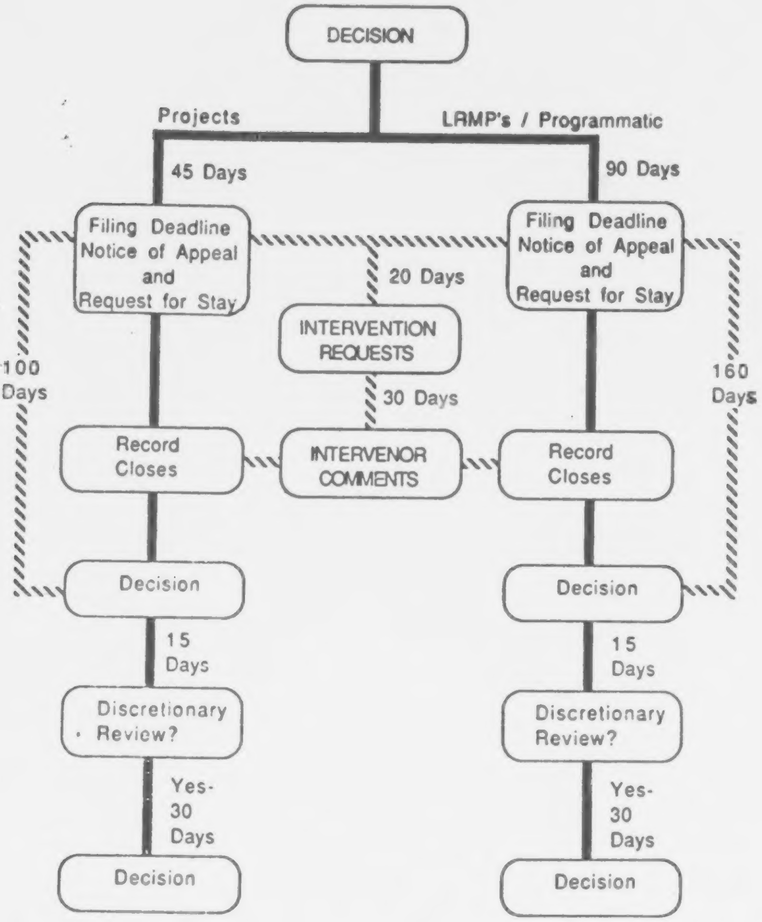
Dated: August 9, 1989.

George M. Leonard,
Associate Chief.

BILLING CODE 3410-11-M

Note.—This appendix will not appear in the Code of Federal Regulations

Appendix A - 36 CFR 217


DECISION
Projects
LRMP's / Programmatic
45 Days
90 Days
Filing Deadline Notice of Appeal and Request for Stay
Filing Deadline Notice of Appeal and Request for Stay
20 Days
INTERVENTION REQUESTS
30 Days
100 Days
160 Days
Record Closes
INTERVENOR COMMENTS
Record Closes
Decision
Decision
15 Days
15 Days
Discretionary Review?
Discretionary Review?
Yes- 30 Days
Yes- 30 Days
Decision
Decision

R Doc. 89-19420 Filed 8-18-89; 8:45 am]
LLING CODE 3410-11-C

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 217 and 251

RIN 0596-AB10

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule amends the administrative appeal procedures at 36 CFR part 217 to require publication of legal notice of decisions subject to appeal and to clarify various appeal procedures which have given rise to questions since adoption of the current rules. Additionally, the rule makes several technical amendments to the Forest Service administrative appeal procedures at 36 CFR part 251, subpart C, to remove ambiguities and inconsistencies in the appeal procedures which have been brought to the agency's attention since the final rule became effective on February 22, 1989 (54 FR 3342, January 23, 1989). The intended effect is to assure that interested or affected parties receive constructive notice of a decision, to provide clear evidence of timely notice, and to improve efficiency and achieve consistency in administering the appeals process. In order to achieve uniformity in processing appeals and to avoid further complications resulting from the identified problems that this rule addresses, it is necessary to make this rule effective quickly. However, the Agency invites public comment on the interim rule, which will be considered in promulgating a final rule.

DATES: This amendment is effective April 5, 1990.

Comments on this rule must be in writing and postmarked by April 20, 1990.

ADDRESSES: Send written comments to F. Dale Robertson, Chief (1570), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on this interim rule in the Office of the Staff Assistant for Operations, National Forest System, Room 4211, South Agriculture Building, 12th and Independence Avenue SW., Washington, DC, between the hours of 8 a.m. and 4 p.m. Those wishing to inspect comments are encouraged to call ahead (382-9346) to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Kathryn Hauser, WO Appeals and Litigation Coordinator, National Forest System, (202) 382-9346.

SUPPLEMENTARY INFORMATION: On January 23, 1989, at 54 FR 3342, part VI, the Secretary of Agriculture gave notice of adoption of two new rules that provide a process for appeal of Forest Service decisions related to management of the National Forest System. The rules at 36 CFR part 251, subpart C, provide appeal procedures applicable to holders of or certain applicants for land use and occupancy authorizations. The rules at 36 CFR part 217 provide a revised process for appeal of National Forest System plan and project decisions. These new rules replaced the administrative appeal procedures at 36 CFR 211.18. Experience under the new rules indicates a need to revise 36 CFR part 217 with regard to requirements for giving notice of decisions and for proper filing of a notice of appeal. Certain technical amendments to 36 CFR part 251, subpart C are also needed. The nature of the amendments and their intended effect is discussed by topic or affected section of the rules.

Amendments to 36 CFR Part 217

1. *Legal Notice of Decisions.* The rule currently specifies at § 217.5 that the Deciding Officer shall promptly mail the appropriate decision document to those who have, in writing, requested it and to those who are known to have participated in the decisionmaking process. Additionally, at § 217.5(c), the Deciding Officer has the discretion to publish a legal notice of the decision in a newspaper of general circulation.

Initially, the Forest Service proposed that notice of decisions be given by publishing a legal notice in a newspaper of general circulation or in the Federal Register, rather than by mail (53 FR 17310). Under the proposed rule, the review period would have begun with the date of publication of the notice. Although the agency's intent was to bring clarity, uniformity, and legal certainty to how and when notice of decisions would be given, those responding to the Federal Register notice viewed the legal notice proposal as an attempt to maintain secrecy, to rush implementation of controversial projects, and to reduce the ability of the general public to appeal decisions. Respondents misinterpreted the proposal. While it was the agency's intent that the legal notice be in addition to mailing requirements, this was not stated in the proposal; thus, many respondents indicated that the proposal was not an effective way to notify the public of decisions and preferred direct notice by mail. Because of these reactions, the final rule retained the current requirement for mailing notices of decisions to persons known to have participated in decisionmaking and to those requesting it in writing and made legal notice discretionary.

However, inadvertent failure by Deciding Officers to identify interested or potentially affected individuals or organizations and then to notify them of a decision continues to be a problem. Moreover, delay between when a decision is signed (currently the start of the appeal period) and when a potential appellant either hears about or receives mailed notice of the decision often reduces, to the detriment of the potential appellant, the time available to file an appeal. Additionally, reliance on mail delivery makes it difficult to establish when notice is actually given. Therefore, this interim rule revises § 217.5(c) to make publication of legal notice in a newspaper of general circulation, or the Federal Register when the Chief is making an initial decision, a requirement rather than an option. The rule also requires that the published notice specify the date the appeal period begins, which will be the day following publication. Because most people interested in, or affected by, a Chief's decision do not reside in the Washington, DC area (where the Chief is headquartered), notice through publication in a newspaper of general circulation in the Washington area would not provide adequate public notice. Therefore, notice of all initial decisions made by the Chief that are subject to review (§ 217.3(a)(1)) shall be published in the Federal Register. This amendment eliminates the need for the current requirement in § 217.5 that a notice be published in the Federal Register for decisions considered to have effects of national concern. Accordingly, the interim rule removes this provision.

It needs to be emphasized that the mandatory legal notice requirement is in addition to the requirement that already exists that the Deciding Officer promptly mail the appropriate decision document to those who have, in writing, requested it and to those who are known to have participated in the decisionmaking process. It also should be noted that it is not the decision itself that Deciding Officers are required to publish. The cost of publishing the decisions would be prohibitive. Rather, what must be published is a legal notice which identifies the decision by title or subject matter, the date of the decision, the name and title of the official making the decision, and how to obtain copies of the decision. As previously noted, the legal notice must also specify that the date the appeal period begins is the day following publication of the notice.

In addition, § 217.5, is amended to require Deciding Officers to publish, at least twice yearly in the Federal Register—at the beginning of the Fiscal Year (October) and at mid-year (April)—a notice identifying which newspaper will be used for their legal notices of appealable decisions. Initially, this notice must appear within 30 days of the date of publication of this interim rule. The rule allows Deciding Officers to place notices in more than one newspaper. However, because of varying publication dates of small newspapers in rural areas where National Forest lands are located, the rule provides that the paper identified in the semiannual Federal Register notice shall be the source used to establish the appeal filing period and evidence of legal notice.

These revisions to the notice requirements respond to both public and agency concerns for ensuring timely notice of decisions. These revisions benefit those who wish to appeal decisions by providing an additional and reliable source of notice and by maximizing the time available for filing a notice of appeal. They also establish a uniform, Service-wide mechanism that provides convincing evidence that the agency has given timely and constructive notice of decisions to the public as required by the National Environmental Policy Act, the National Forest Management Act, and their implementing regulations, policies, and procedures. These revisions reflect the agency's continuing commitment to improve its handling of administrative appeals and to be responsive to public comments regarding the appeals process. To this end, the agency remains open to suggestions on improving the appeals process, including the manner of giving notice of decisions subject to appeal.

These changes in notice requirements require a corollary amendment to § 217.2 to add a definition of "legal notice." The change in the date that the appeal period begins requires conforming amendments to § 217.8(a) to replace the reference to filing appeals within 45 or 90 days of the "date of decision" to require filing of appeals within 45 or 90 days of the "date specified in the published legal notice."

2. *Dismissal Without a Decision.* The current rule (§ 217.8(a)) requires an appellant to file a timely Notice of Appeal with both the Deciding Officer and Reviewing Officer, a feature new to the appeal process. This filing requirement was added to expedite appeals by enabling Deciding Officers, upon receipt, to begin assembling the decision documentation required by 36 CFR 217.15(a). The rule limits the Deciding Officer to 30 days following receipt of the appeal to accomplish this task.

Since the effective date of the final rule, a question has arisen as to how the Forest Service should respond when an appellant fails to file the Notice of Appeal with both officers. If an appellant files a timely Notice of Appeal with the Deciding Officer, but fails to file a timely Notice of Appeal with the Reviewing Officer, the Reviewing Officer does not know about the appeal and so cannot initiate requisite procedures to process it in a timely fashion. Conversely, if an appellant files a timely Notice of Appeal with the Reviewing Officer, but fails to also file with the Deciding Officer, the Deciding Officer does not know to begin preparing the decision documentation, and, by being deprived of the time necessary to compile the documentation, may be unable to comply with the timeframes mandated in the rule. In either case, valuable time is lost and confusion is created when both officers do not receive a notice of appeal. As a result, the agency cannot administer the appeals process in a timely, efficient, and orderly manner.

Currently, untimely appeals are dismissable, but failure to file with both the Deciding Officer and Reviewing Officer is not a basis for dismissal. Because of the impact of simultaneous filing on timely processing of appeals within the timeframes specified in the regulation, the requirement to file Notices of Appeal with both the Reviewing Officer and the Deciding Officer is itself as important as timely filing, and failure to meet this requirement is appropriate grounds for dismissal. For these reasons, § 217.11(a) is revised to specifically state that failure to file an appeal with both Officers shall be grounds for dismissal without a decision on the merits. A corresponding cross-reference is added to § 217.8 Appeal Process Sequence to alert potential appellants early in the rule to the consequence of failing to simultaneously provide copies to the Reviewing Officer and the Deciding Officer.

3. *Evidence of Timely Filing.* Under the new notice requirements, there will be an interval of time between signing a decision and publication of a legal notice of that decision. Therefore, it is possible that a potential appellant could learn of a decision prior to publication of the legal notice and could file an appeal before the specified filing period. Because premature filing of appeals could cloud the determination of various timeframes under the rule, § 217.8(c) is amended to state that appeals received prior to the start of the appeal period shall be accepted, but time frames are tied to the date specified in the legal notice.

4. *Notice of Appeal.* Section 217.9 specifies the required content of a Notice of Appeal, an improvement over 36 CFR 211.18 which had ambiguous requirements. In adopting this provision, the Department did not anticipate receiving lengthy, cumbersome, or unclear Notices of Appeal. However, just the opposite has happened.

Since March 1989, the Forest Service has recived a number of appeal documents well in excess of 200 pages. The agency requires two copies of a notice of appeal—one each for the reviewing and deciding levels—in order to conduct a review and establish the appeal record. Both the Deciding and Reviewing Officers have a need to make additional copies of the Notice of Appeal available to Staff specialists assisting them in assembling and reviewing the record. Because the burden of reproducing additional copies of lengthy notices of appeal has been assumed by the agency, delays in processing appeals have occurred as well as an increase in duplicating costs. Accordingly, § 217.9(b) is amended to require that appellants submit two copies of a Notice of Appeal to each Officer when the Notice is more than 10 pages in length. This duplicating requirement is an appropriate responsibility for an appellant who files lengthy appeals to assume. It will not inconvenience individual appellants who may not have easy access to copier services. Agency experience shows that almost all appeals filed by individuals are less than 10 pages, while those filed by organized groups and entities—who do have ready access to copier services—often exceed 10 pages. By reducing the administrative time required to handle and process a notice of appeal, this requirement for additional copies will facilitate timely response by Deciding and Reviewing Officers to appeals, which benefits the appellant.

The agency also is encountering increasing failure by persons interested in Forest Service decisions to identify the nature of documents submitted regarding appealable decisions. To illustrate, on a recent decision two letters were received in the Chief's Office, about a month apart. The Chief acknowledged the first letter as a Notice of Appeal. However, by return mail the correspondent informed the Chief that they did not wish their letter to be considered an appeal, but rather as formal comments on the Final Environmental Impact Statement (FEIS). When a second letter was received, containing comments similar to those of the first correspondent, the agency considered it as informal comment on the FEIS. However, after not receiving any communication from the Chief, the correspondent called and learned that, contrary to their intention, the agency had considered the letter as comments on the FEIS, not an appeal. The word "appeal" was not used in either letter. This confusion could have been avoided if the correspondents had clearly identified whether or not the letters were notices of appeal. Therefore, in an effort to eliminate uncertainty or mishandling of written comments on decisions, § 217.9(b) is amended to require that an appellant state that a submission is a Notice of Appeal pursuant to 36 CFR part 217.

5. *Implementation and Stays of Decisions.* It is the Department's position that constructive notice has not been given unless the public has had the opportunity to learn about a decision prior to its implementation. Therefore, it is necessary to ensure that decisions are not implemented until legal notice of the decision is published. Moreover, the ed purpose of the appeal process is "* * * provide a process by which a person or organization interested in the management of the National Forest System may obtain review of an intended action by a higher level official." (36 CFR 217.1(a)) It is incumbent on the agency to provide a reasonable period of time between publication of the legal notice and implementation of the decision to reduce the possibility of an appeal being mooted through implementation of the decision before someone could file an appeal and request for stay. Therefore, a period of 7 calendar days is provided. Accordingly, § 271.10 is revised to reflect this policy. This change necessitates a corollary change in the heading of this section; therefore, it has been changed to "Implementation and Stays of Decisions."

6. *Discretionary Review.* This interim rule also removes discretionary review of certain dismissal decisions. The current rule requires the Reviewing Officer to dismiss an appeal and close the appeal record without decision on the merits when an appellant withdraws an appeal (§ 217.11(6)) or when the Deciding Officer withdraws the appealed decision (§ 217.11(7)). Further, le subjects both of these dismissals to discretionary review. One of the stated objectives of the new appeal rule was to streamline the process and eliminate burdensome paperwork. To provide discretionary review of dismissals of these types of decisions serves no useful purpose. Thus, paragraph (b) of § 217.11 is revised to exclude these types of dismissal decisions from discretionary review. This change is consistent with established agency policy under the previous appeal rule, 36 CFR 211.18.

Section 217.17 provides one level of appeal with a discretionary second-level review by the next higher administrative level, except that, for decisions made at the District Ranger level, a two-level appeal process is provided. Additionally, this section provides for discretionary review of stay decisions rendered by Forest Supervisors and dismissal decisions rendered by Forest Supervisors, Regional Foresters, and the Chief. Some confusion has arisen with regard to § 217.17(b), which directs that within one day following the date of a Forest Supervisor's stay decision, a dismissal decision, or an appeal decision rendered by a Reviewing Officer, the appeal decision and decision documentation will be forwarded to the next higher administrative level. This could be construed as a contradiction to § 217.7(c), which specifies that a second-level appeal decision will not receive futher review. Therefore, to eliminate potential confusion, paragraph (b) of § 217.17 is revised to clearly state which appeal decisions are subject to discretionary review.

7. *Extension of Time.* Section 217.12 currently allows Reviewing Officers, on their own initiative, or at the Deciding Officer's request to extend the time periods for review for a specified period to allow for conduct of meaningful negotiations. Currently, if time is extended for negotiations, all specified time periods are put "on hold." If negotiations do not lead to an appeal being resolved, the review process will be continued for a duration of the unexpired timelines. This had led to debate and confusion within and outside the agency about whether timelines for intervention and Deciding Officer's decision documentation transmittal are or should be affected by extensions permitted under the rule. To end the confusion, § 217.12 is amended to specify that Reviewing Officers shall not extend the time periods for review prior to the end of the time period allowed for intervention. A conforming amendment is also made to § 217.15 stating that the 30 days provided for the Deciding Officer to transmit the record to the Reviewing Officer is not extendable under any circumstance.

Amendments to 36 CFR Part 251, Subpart C

8. *Section 251.92.* Consistent with the stated intent of having the two appeal rules consistent as appropriate, § 251.92(c) is revised in the same manner as 36 CFR 217.11 to remove discretionary review of certain dismissal decisions.

9. *Section 251.95.* This section gives the Reviewing Officer the authority to ask any party to an appeal for additional information as deemed necessary to decide the appeal, except in discretionary reviews. This could be construed as a contradiction when reading paragraph (c)(2) to § 251.87(c)(2) which states, in part, that a second level appeal of a District Ranger's initial decision "* * * shall be conducted on the existing record and no additional information shall be added to the file." Therefore, to avoid confusion, paragraph (c) is being revised to clarify that the Reviewing Officer cannot ask for or accept additional information in second level appeals of District Rangers decisions.

10. *Section 251.100.* Consistent with the stated intent of having the two appeal rules consistent as appropriate, § 251.100(b) is revised in the same manner as 36 CFR 217.17 to clearly state which appeal decisions are subject to discretionary review.

Public Comment

There is a compelling and immediate need to treat appeals uniformly and to minimize the confusion that has been generated by having two new, different rules apply to appeals. Moreover, the constructive notice of decisions provided by this rulemaking will be of immediate benefit to potential appellants and intervenors by guaranteeing that notice is available to anyone interested in decisions affecting national forest plans and projects. Delaying implementation of this rule to allow for comment on a proposed rule would deprive appellants and intervenors of the benefits of the notice and intervention mechanisms of this rulemaking. Therefore, good cause exists to make this rule effective without benefit of prior public comment. However, comments are invited on the interim rule and will be considered in adoption of a final rule.

Regulatory Impact

This interim rule has been reviewed under USDA procedures and Executive

Order 12291 of Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets.

Moreover, this interim rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This final rule governs administrative proceedings and, as such would not have a significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4, 7 CFR 1b.3(a)(1)).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and therefore imposes no paperwork burden on the public.

List of Subjects

36 CFR Part 217

Administrative practice and procedure, National forests.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—right-of-way, Reporting and recordkeeping requirements, Water resources.

Therefore, for the reasons set forth in the preamble, chapter II of title 36 of the Code of Federal Regulations is amended as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS [AMENDED]

1. The authority citation for part 217 continues to read:

Authority: 16 U.S.C. 551, 472.

2. Amend § 217.2 by adding in proper alphabetical sequence a definition of "legal notice" to read as follows:

§ 217.2 Definitions.

* * * * *

"Legal notice". A notice of a decision appealable under this part published in the Federal Register or in the legal notices section of a newspaper of general circulation as required by § 217.5 of this part.

* * * * *

3. In § 217.5, revise paragraphs (b) and (c), and add new paragraph (d) to read as follows:

§ 217.5 Giving notice of decision subject to appeal.

(a) * * *

(b) The Deciding Officer shall also give notice of decisions appealable under this part as follows:

(1) For all initial decisions of the Chief, notice shall be published in the **Federal Register**.

(2) For all other decisions, legal notice of the decision shall be published in a newspaper of general circulation identified pursuant to the requirements of paragraph (d) of this section. Deciding Officers may, at their discretion, also publish notice of their decisions in additional newspapers. Where a Deciding Officer elects to publish such additional notices, they shall be published after an initial legal notice has been published in the principal newspaper identified in the biannual Federal Register notice provided for in paragraph (d) of this section. Any such additional newspaper notices shall indicate the date that the appeal period ends, which shall be calculated based on the date of publication of the initial notice in the principal newspaper identified in the biannual **Federal Register** notice.

(c) All notices published pursuant to this section shall include a concise description of the decision made by title or subject matter, the date of the decision, the name and title of the official making the decision, and information on how to obtain a copy of the decision, and shall specify that the appeal period begins the day following the notice's publication as provided for in § 217.8(b)(1).

(d) Initially within 30 days of March 6, 1990, and thereafter at least twice annually, in April and in October, each responsible Forest Service officer shall, through Federal Register notice, advise the public of the principal newspaper to be utilized for publishing legal notices required by this section. The Federal Register notice shall also list all additional newspapers which the Deciding Officer expects to use for purposes of providing additional notice pursuant to paragraph (b) of this section.

4. In § 217.8, revise paragraph (a), the first sentence of paragraph (b)(1), and the last sentence of paragraph (c) to read as follows:

§ 217.8 Appeal process sequence.

(a) *Filing procedures.* To appeal a decision under this part, a person or organization must:

(1) File a written notice of appeal with the next higher line officer in accordance with the provisions of § 217.9 of this part and simultaneously send a copy of the notice of the appeal to the Deciding Officer. As provided in § 217.11, failure to comply with the simultaneous filing requirement of this section shall result in dismissal of the appeal without a decision on the merits.

(2) File the notice of appeal within 45 days of the date specified in the published legal notice for project decisions or non-significant amendments to land and resource management plans documented in a Decision Memo, Decision Notice, or Record of Decision, or programmatic decisions documented in a Decision Notice.

(3) File the notice of appeal within 90 days of the date specified in the published legal notice for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions documented in a Record of Decision.

(b) *Computation of time periods.* (1) The day after the published notices required in § 217.5(b) is the first day of the appeal period provided for in paragraphs (a)(2) and (a)(3) of this section. * * *

(c) * * * Notices of appeal that are filed before the filing period specified in the published legal notice shall be accepted, but premature filing does not affect timeframes specified in this rule.

* * * * *

5. In § 217.9, redesignate paragraphs (b)(1)–(b)(6) as paragraphs (b)(2)–(b)(7), and add new paragraphs (b)(1) and (c) to read as follows:

§ 271.9 Content of a notice of appeal.

* * * * *

(b) * * *

(1) State that the document is a Notice of Appeal filed pursuant to 36 CFR part 217;

* * * * *

(c) When a Notice of Appeal is more than 10 pages in length, appellants must file two copies of a Notice of Appeal with the Reviewing Officer and simultaneously send two copies to the Deciding Officer.

6. In § 217.10 revise the section heading, redesignate paragraphs (a)–(h)

as (b)–(i), and add a new paragraph (a) to read as follows:

17.10 Implementation and stays of cisions.

(a) Implementation of any decision subject to appeal pursuant to this part shall not occur for 7 calendar days following publication of the legal notice of the decision as required in this part.

* * * * *

7. In § 217.11, add a new paragraph (a)(7) and revise paragraph (c) to read as follows:

§ 217.11 Dismissal without review.

(a) * * *

(7) The appellant fails to file the notice of appeal with the Reviewing Officer and simultaneously send a copy to the Deciding Officer as required in § 217.8(a).

(b) * * *

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 217.7(d) of this part, except when a dismissal decision results from withdrawal of an appeal by an appellant or withdrawal of the initial decision by the Deciding Officer.

8. In paragraph (a) of § 217.12, revise the last sentence and add a new sentence to read as follows:

7.12 Resolution of issues.

(a) * * * At the request of the Deciding Officer, or on their own initiative, Reviewing Officers may extend the time periods for review to allow for conduct of meaningful negotiations after the Deciding Officer has transmitted the decision documentation and after the time period for intervention has elapsed. In granting an extension, the Reviewing Officer must establish a specific time period for the conduct of negotiations.

* * * * *

9. In § 217.15, add a new sentence at the end of paragraph (a) to read as follows:

§ 217.15 Appeal record.

(a) * * * The 30-day time period is not extendable under any circumstances.

10. In § 217.17 revise paragraph (b) to read as follows:

§ 217.17 Discretionary review.

* * * * *

(b) As provided for in §§ 217.7 (d) and (e), 217.10(h), and 217.11, stay decisions rendered by a Forest Supervisor, certain dismissal decisions rendered by Forest ice line officers, and first-level al decisions rendered by Regional esters and the Chief (§ 217.16) are subject to discretionary review at the next highest administrative level. Within one day following the date of any decision subject to such discretionary review, the Reviewing Officer shall forward a copy of the decision and the decision documents (§ 217.2) upon which the appeal was predicated to the next higher officer.

* * * * *

PART 251—LAND USES

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

11. The authority citation for subpart C continues to read as follows:

Authority: 16 U.S.C. 472, 551.

12. In § 251.92, revise paragraph (c) to read as follows:

§ 251.92 Dismissal.

* * * * *

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 251.87(d) of this part, except when a dismissal decision results from withdrawal of an appeal by an appellant or withdrawal of the initial decision by the Deciding Officer.

13. In § 251.95, revise the first sentence of paragraph (c) to read as follows:

§ 251.95 Authority of reviewing officer.

* * * * *

(c) *Requests for additional information.* Except in discretionary review conducted pursuant to § 251.100 and second level appeals of decisions made by the District Ranger pursuant to § 251.87(c) of this subpart, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. * * *

14. In § 251.100 revise paragraph (b) to read as follows:

§ 251.100 Discretionary review.

* * * * *

(b) As provided for in §§ 251.87 (d) and (e), 251.91(k), and 251.92, stay decisions rendered by a Forest Supervisor, certain dismissal decisions rendered by Forest Service line officers, and first-level appeal decisions rendered by Regional Foresters and the Chief (§ 251.99), are subject to discretionary review at the next highest administrative level. Within one day following the date of a decision subject to such discretionary review, the Reviewing Officer shall forward a copy of the decision and the initial decision upon which the appeal is predicated to the next higher officer.

* * * * *

Dated: February 24, 1990.

Clayton Yeutter,

Secretary.

[FR Doc. 90-5007 Filed 3-5-90; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL 3723-8]

New York; Final Authorization of State Hazardous Waste Program Revisions

AGENCY: Environmental Protection Agency.

ACTION: Immediate final rule.

SUMMARY: New York has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed New York's application and has made a decision, subject to public review and comment, that New York's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. Thus, EPA intends to approve New York's hazardous waste program revisions. New York's application for program revision is available for public review and comment.

DATES: Final authorization for New York shall be effective May 7, 1990, unless EPA publishes a prior Federal Register action withdrawing this immediate final rule. All comments on New York's program revision application must be received by the close of business April 5, 1990.

ADDRESSES: Copies of New York's program revision application are available during the business hours of 9 a.m. to 5 p.m. at the following addresses for inspection and copying:

New York State Department of Environmental Conservation, 50 Wolf Road, Room 204, Albany, New York 12233–0001; Phone (518) 457–3273

U.S. EPA Headquarters Library, PM 211A, 401 M Street, SW., Washington, DC. 20460; Phone (202) 382–5926

U.S. EPA Region II Library, Room 402, 26 Federal Plaza, New York, New York 10278; Phone (212) 264–2881.

Written comments should be sent to Mr. Conrad Simon, Director, Air and Waste Management Division, U.S. EPA, Region II, 26 Federal Plaza, Room 1011, New York, New York 10278.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth E. Hamilton, Hazardous Waste Programs Branch, U.S. EPA, Region II, 26 Federal Plaza, Room 1107,

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SALE/NEPA VOLUMES ANE S

		FY87		FY88		FY89		FY90		FY91		FY92		FY93		FY94	
		SALES	NEPA	SALES	NEPA	SALES	NEPA	SALES	NEPA	SALES	NEPA	SALES	NEPA	SALES	NEPA	SALES	NEPA
BVHD	VOL	10	10	8	8	14	14	18	35	24	40	24	32	24	24	24	24
	M$	675	714	690	875	808	875	754	2488	992	2840	1002	2274	1002	1694	1002	1694
BTTR	VOL	0	0	15	14	32	43	31	35	30	59	31	60	36	44	36	39
	M$	0	0	626	825	813	1013	813	1133	813	1423	813	1463	885	1323	865	1093
CUST	VOL	0	0	5	36	34	4	6	6	4	6	3	4	5	3	3	3
	M$	0	0	398	180	954	132	592	251	391	229	467	168	508	97	448	97
DRLG	VOL	0	0	19	19	25	25	21	33	23	33	23	33	24	24	24	24
	M$	0	0	440	741	553	923	464	1638	513	1638	514	1638	533	1206	537	1206
FTHD	VOL	72	0	63	0	60	0	87	117	87	168	87	169	95	150	149	204
	M$	3958	0	3673	0	4281	228	4089	1026	4115	1998	4115	2017	4477	1544	7006	1825
GALL	VOL	0	0	3	29	26	26	19	34	25	44	19	44	18	44	17	32
	M$	0	0	846	356	1280	405	1215	567	1080	805	929	805	894	805	930	640
HEL	VOL	14	14	11	11	13	15	13	25	18	30	18	29	18	15	19	16
	M$	523	563	405	699	698	709	687	1369	949	1637	949	1577	949	827	1003	892
KOOT	VOL	0	0	172	172	191	200	239	258	219	246	233	239	239	225	232	214
	M$	0	0	4051	2129	4666	2506	5448	2961	5231	2824	5422	2744	5739	2585	5544	2457
L&C	VOL	12	12	9	16	14	27	13	18	13	16	13	13	12	13	13	12
	M$	505	321	216	421	253	727	424	486	461	435	522	346	537	338	551	324
LOLO	VOL	73	73	83	83	97	84	71	140	105	150	110	151	120	137	130	137
	M$	3738	850	3376	1050	3904	1125	4215	1700	4311	1880	4512	1930	4783	1830	5242	1830
RO	M$	571	149	1534	749	1865	995	1902	1892	2030	1935	2030	1818	2064	1633	2220	1592
MONT	VOL	181	109	388	388	506	438	518	701	548	792	561	774	591	679	647	705
FOREST	M$	9399	2448	14721	7276	18210	8643	18701	13619	18856	15709	19245	14962	20307	12249	23128	12058
MONT	M$	9970	2597	16255	8025	20075	9638	20603	15511	20886	17644	21275	16780	22371	13882	25348	13650
TOT MT.	M$	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		36253		[illegible]	
FOR COST	MBF	52	22	38	19	36	20	36	19	34	20	34	19	34	18	36	17
IPNF	VOL	0	0	256	230	229	242	230	321	230	329	247	316	293	306	311	302
	M$	0	0	6388	1300	7035	1900	6010	8078	7649	8124	7087	7873	6793	7412	6621	7159
CLW	VOL	0	0	137	222	141	458	141	548	147	370	154	260	123	325	194	300
	M$	0	0	1862	2864	2640	4510	3245	7595	3430	6272	3530	5564	3350	5679	3250	5466
NEZP	VOL	0	0	108	72	108	140	97	155	107	125	112	100	112	100	118	100
	M$	0	0	2279	894	2825	1316	3360	1851	3473	1751	3542	1531	3542	1531	3542	1531
RO	M$	190	50	511	250	621	332	634	630	676	645	677	606	689	544	740	531
IDAHO	VOL	0	0	501	524	478	840	468	1024	484	824	513	676	528	731	623	702
FOREST	M$	0	0	10529	5058	12500	7726	12615	17524	14552	16147	14159	14968	13685	14622	13413	14156
IDAHO	M$	190	50	11040	5308	13121	8058	13249	18154	15228	16792	14836	15574	14374	15166	14153	14687
TOT ID.	M$	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		30410		29540		[illegible]	
FOR COST	MBF			21	10	26	9	27	17	30	20	28	22	26	20	22	20
R-1	VOL	181	109	889	912	984	1278	986	1725	1032	1616	1074	1450	1119	1410	1270	1407
RO	M$	761	199	2045	999	2486	1327	2536	2522	2706	2580	2707	2424	2753	2177	2960	2123
Forest	M$	9399	2448	25250	12334	30710	16369	31316	31143	33408	31856	33404	29930	33992	26871	36541	26214
R-1	M$	10160	2647	27295	13333	33196	17696	33852	33665	36114	34436	36111	32364	36745	29048	39501	28337
TOT R-1	M$	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		65793		[illegible]	
FOR COST	MBF	52	22	28	14	31	13	32	18	32	20	31	21	30	19	29	19

FY95 SALES	FY95 NEPA	FY96 SALES	FY96 NEPA	FY97 SALES	FY97 NEPA	SALE TOTAL	NEPA TOTAL	TOTAL M$
24	24	23	24	0	0	193	235	
1002	1310	961	1310	0	0	8888	16074	24962
38	40	40	40	39	40	328	414	
865	1063	865	1063	865	1063	8223	11462	19685
3	3	3	3	3	3	69	71	
448	97	448	97	448	97	5102	1445	6547
24	24	24	26	24	26	231	267	
537	1206	537	1302	537	1302	5165	12800	17965
150	201	150	150	106	106	1106	1265	
7051	1754	7808	0	5517	0	56090	10392	66482
19	19	19	19	21	19	186	310	
1349	353	1349	353	1545	353	11417	5442	16859
15	15	15	15	0	0	154	185	
793	838	793	833	0	0	7749	9944	17693
247	235	242	220	256	225	2270	2234	
5840	2697	5812	2526	6217	2583	53970	26012	79982
13	15	11	19	0	0	123	161	
470	405	305	500	0	0	4244	4303	8547
136	137	146	137	0	0	1071	1229	
5538	1830	5879	1830	0	0	45498	15855	61353
2223	1478	2282	1364	1695	1094	20416	14699	35115
669	713	673	653	449	419	5731	6371	
23893	11553	24757	9814	15129	5398	206346	113729	320075
26116	13031	27039	11178	16824	[redacted]	226762	128428	355190
	[redacted]		[redacted]				355190	
36	16	37	15	34	13			
316	275	317	275	321	275	2750	2871	
5825	6088	5825	6088	5825	6088	65058	60110	125168
203	275	212	250	218	250	1670	3258	
3350	5152	3450	5019	3375	4994	31482	53115	84597
106	100	112	105	100	105	1080	1102	
3542	1531	3542	1531	3542	1531	33189	14998	48187
741	493	761	455	564	365	6804	4901	11705
625	650	641	630	639	630	5500	7231	
12717	12771	12817	12638	12742	12613	129729	128223	257952
13458	[redacted]	13578	13093	13306	[redacted]	136533	133124	269657
			[redacted]				269657	
20	20	20	20	20	20			
1294	1363	1314	1283	1088	1049	11231	13602	
2964	1971	3043	1819	2259	1459	27220	19600	46820
36610	24324	37574	22452	27871	18011	336075	241952	578027
39574	[redacted]	40617	[redacted]	30130	[redacted]	363295	261552	624847
							624847	
28	18	29	17	26	17			

NEPA STRATEGY TO GET VOLUMES THROUGH GATES 2

		FY87		FY88		FY89		FY90		FY91		FY92		FY93		FY94	
		ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD
BVHD	VOL	4	6	7	1	3	11	10	25	12	28	10	22	7	17	7	17
	M$	279	436	796	79	184	691	711	1777	852	1988	711	1563	498	1196	498	1196
BTTR	VOL	0	0	14	0	27	16	31	4	55	4	55	5	40	4	35	4
	M$	0	0	825	0	638	375	1003	130	1327	96	1341	122	1203	120	981	112
CUST	VOL	0	0	36		4		4	2	4	2	4		3		3	
	M$	0	0	180	0	132	0	123	128	122	107	168	0	97	0	97	0
DRLG	VOL	0	0	11	8	22	3	24	9	24	9	24	9	15	9	15	9
	M$	0	0	429	312	782	141	1152	486	1152	486	1152	486	720	486	720	486
FTHD	VOL	0	0	0		0		104	13	158	10	169		150		204	
	M$	0	0	0	0	228	0	912	114	1879	119	2017	0	1544	0	1825	0
GALL	VOL	0	0	24	5	21	5	15	19	25	19	25	19	25	19	19	13
	M$	0	0	266	90	315	90	225	342	425	380	425	380	425	380	380	260
HEL	VOL	14	0	7	4	13	2	20	5	25	5	25	4	11	4	10	6
	M$	563	0	447	252	606	103	1072	297	1340	297	1340	237	590	237	536	356
KOOT	VOL	0	0	150	22	188	12	232	26	230	16	214	25	225	0	204	10
	M$	0	0	1788	341	2439	67	2663	298	2640	184	2457	287	2585	0	2342	115
L&C	VOL	12	0	16	0	23	4	16	2	11	5	13	0	10	3	8	4
	M$	321	0	421	0	616	111	435	51	297	138	346	0	270	68	213	111
LOLO	VOL	59	14	56	27	43	41	100	40	105	45	106	45	97	40	97	40
	M$	650	200	650	400	505	620	1100	600	1200	680	1250	680	1150	680	1150	680
RO	M$	110	39	603	146	716	279	1051	841	1171	764	1123	695	991	642	959	633
MONT	VOL	89	20	321	67	344	94	556	145	649	143	645	129	583	96	602	103
		109		388		438		701		792		774		679		705	
	M$	1923	674	6405	1620	7161	2477	10447	5064	12405	5239	12330	4450	10073	3809	9701	3949
IPNF	VOL	0	0	230	0	222	20	226	95	229	100	221	95	221	85	221	81
	M$	0	0	1200	100	1400	500	4339	3739	4428	3696	4278	3595	4270	3142	4243	2916
CLW	VOL	0	0	193	29	374	84	248	300	165	205	105	155	100	225	100	200
	M$	0	0	2093	771	2805	1705	2368	5227	2071	4201	1772	3792	1654	4025	1734	3732
NEZP	VOL	0	0	67	5	120	20	100	55	110	15	80	20	85	15	70	30
	M$	0	0	830	64	1132	184	1202	649	1541	210	1225	306	1301	230	1072	459
RO	M$	37	13	201	49	239	93	350	280	390	255	374	232	330	214	320	211
IDAHO	VOL	0	0	490	34	716	124	574	450	504	320	406	270	406	325	391	311
		0		524		840		1024		824		676		731		702	
	M$	37	13	4324	984	5576	2482	8259	9895	8430	8362	7649	7925	7555	7611	7369	7318
R-1	VOL	89	20	811	101	1060	218	1130	595	1153	463	1051	399	989	421	993	414
		109		912		1278		1725		1616		1450		1410		1407	
RO	M$	147	51	804	195	954	372	1402	1121	1561	1019	1497	927	1321	856	1279	844
Forest	M$	1813	636	9925	2409	11782	4587	17305	13838	19274	12582	18482	11448	16307	10564	15791	10423
R-1	M$	1959	687	10729	2604	12736	4959	18707	14959	20835	13601	19979	12375	17628	11420	17070	11267

FY95		FY96		FY97				Total
ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD			
7	17	7	16			BVHD	VOL	193
674	1638	674	1597	0	0		M$	24962
34	4	36	4	36	3	BTTR	VOL	328
1725	203	1735	193	1780	148		M$	19685
3		3		3		CUST	VOL	69
545	0	545	0	545	0		M$	6547
15	9	15	9	15	9	DRLG	VOL	231
1050	693	1146	693	1146	693		M$	17965
150		150		106		FTHD	VOL	1106
8805	0	7808	0	5517	0		M$	66482
5	14	5	14	5	16	GALL	VOL	186
330	1372	330	1372	330	1568		M$	16859
9	6	10	5			HEL	VOL	154
954	677	1061	565				M$	17693
243	4	236	6	247	9	KOOT	VOL	2270
8411	126	8145	193	8511	289		M$	79982
10	3	7	4			L&C	VOL	123
700	175	518	287				M$	8547
82	54	106	40			LOLO	VOL	1071
4302	3066	5318	2391				M$	61353
2652	1049	2690	956	2097	690		M$	35115
558	111	575	98	412	37	MONT	VOL	5731
669		673		449				
30148	8999	29970	8247	19926	3388		M$	355190
221	95	221	96	221	100	IPNF	VOL	2750
8630	3283	8630	3283	8630	3283		M$	125168
72	131	82	130	114	104	CLW	VOL	1670
3681	4821	3755	4714	3755	4614		M$	84597
81	25	102	10	85	15	NEZP	VOL	1080
3855	1218	4617	456	4312	761		M$	48187
884	350	897	319	699	230		M$	11705
374	251	405	236	420	219	IDAHO	VOL	5500
625		641		639				
17050	9672	17899	8772	17396	8888		M$	269657
932	362	980	334	832	256	R-1	VOL	11231
1294		1314		1088				
3537	1399	3587	1275	2797	920		M$	46820
43662	17272	44282	15744	34526	11356		M$	578027
47199	18671	47869	17019	37323	12276		M$	624847

UNCONSTRAINED STRATEGY

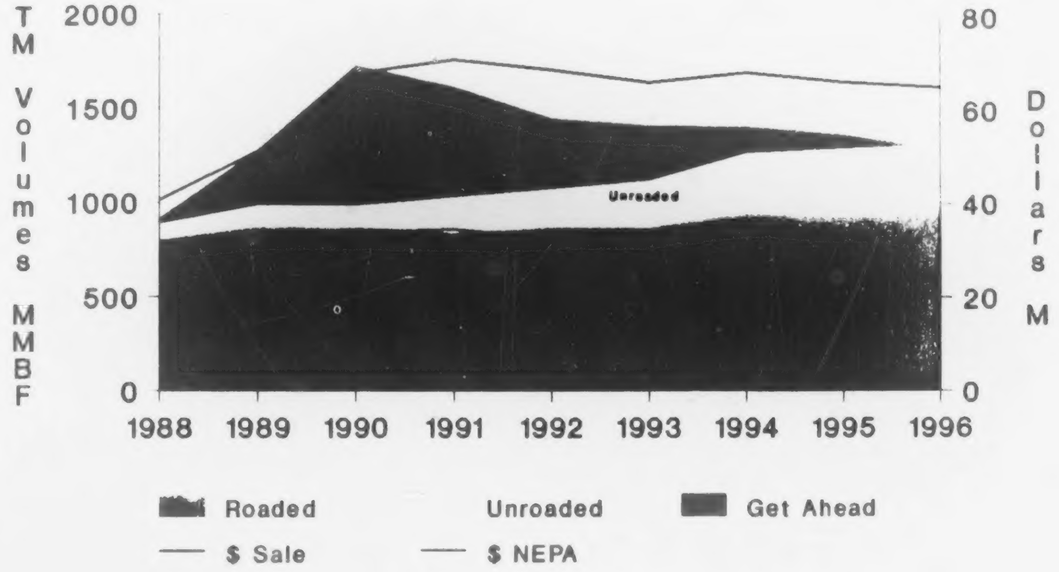
SALE STRATEGY (VOLUME OFFERED) TO MEET ASQ THRU 1ST FP DECADE

		FY87		FY88		FY89		FY90		FY91		FY92		FY93		FY94	
		ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD
BVHD	VOL	4	6	7	1	3	11	5	13	7	17	7	17	7	17	7	17
	M$	542	848	1424	141	353	1330	924	2318	1144	2688	1003	2273	790	1906	790	1906
BTTR	VOL	0	0	15	0	22	10	27	4	28	2	27	4	31	5	32	4
	M$	0	0	1451	0	1256	570	1696	250	2086	150	1982	294	1901	307	1740	218
CUST	VOL	0	0	5		34		4	2	2	2	3		3	2	3	
	M$	0	0	578	0	1086	0	715	128	270	350	635	0	280	325	545	0
DRLG	VOL	0	0	11	8	22	3	19	2	16	7	15	8	19	5	15	9
	M$	0	0	685	496	1266	210	1570	532	1504	647	1482	670	1138	601	1050	693
FTHD	VOL	72	0	63		60		74	13	77	10	87		95		149	
	M$	3958	0	3673	0	4509	0	4351	764	5410	703	6132	0	6021	0	8831	0
GALL	VOL	0	0	3	0	21	5	5	14	5	20	8	11	5	13	6	11
	M$	0	0	1112	90	1255	430	410	1372	425	1460	656	1078	425	1274	492	1078
HEL	VOL	14	0	7	4	11	2	8	5	13	5	14	4	14	4	13	6
	M$	1086	0	706	398	1197	210	1492	564	2022	564	2075	451	1325	451	1218	677
KOOT	VOL	0	0	172	0	191	0	235	4	189	30	212	21	198	41	213	19
	M$	0	0	5839	341	7105	67	8110	299	7042	1013	7421	745	6996	1328	7365	636
L&C	VOL	12	0	9	0	11	3	11	2	10	3	11	2	7	5	13	0
	M$	826	0	637	0	791	189	798	112	721	175	735	133	518	357	875	0
LOLO	VOL	59	14	56	27	63	34	47	24	60	45	61	49	86	34	86	44
	M$	3530	1058	2778	1648	3003	2026	3521	2394	3473	2718	3571	2871	4593	2020	4530	2542
RO	M$	604	116	1999	284	2341	519	2518	1276	2539	1426	2592	1256	2441	1256	2687	1125
MONT	VOL	161	20	348	40	438	68	435	83	407	141	445	116	465	126	537	110
		181		388		506		518		548		561		591		647	
	M$	10546	2021	20882	3398	24163	5550	26105	10009	26636	11894	28284	9771	26428	9825	30123	8875
IPNF	VOL	0	0	234	22	207	22	210	20	230	0	222	25	223	70	221	90
	M$	0	0	7588	100	8155	780	9346	4742	9425	6348	9024	5936	8922	5283	8790	4990
CLW	VOL	0	0	119	18	117	24	139	2	108	39	105	49	91	32	79	115
	M$	0	0	3458	1268	4605	2545	3983	6857	3881	5821	3582	5512	3264	5765	3344	5372
NEZP	VOL	0	0	101	7	108	0	84	13	90	17	96	16	89	23	108	10
	M$	0	0	2982	191	3957	184	4533	678	4389	835	4363	710	4007	1066	4667	406
RO	M$	201	39	666	95	780	173	839	425	846	475	864	419	814	419	896	375
IDAHO	VOL	0	0	454	47	432	46	433	35	428	56	423	90	403	125	408	215
		0		501		478		468		484		513		528		623	
	M$	201	39	14694	1654	17497	3682	18701	12702	18541	13479	17833	12577	17007	12533	17697	11143
R-1	VOL	161	20	802	87	870	114	868	118	835	197	868	206	868	251	945	325
		181		889		984		986		1032		1074		1119		1270	
RO	M$	805	154	2666	379	3122	692	3357	1702	3385	1901	3456	1675	3255	1675	3583	1500
Forests	M$	9942	1906	32911	4673	38538	8541	41449	21010	41792	23472	42661	20673	40180	20683	44237	18518
R-1	M$	10747	2060	35576	5051	41660	9232	44806	22712	45177	25373	46117	22348	43435	22358	47820	20018

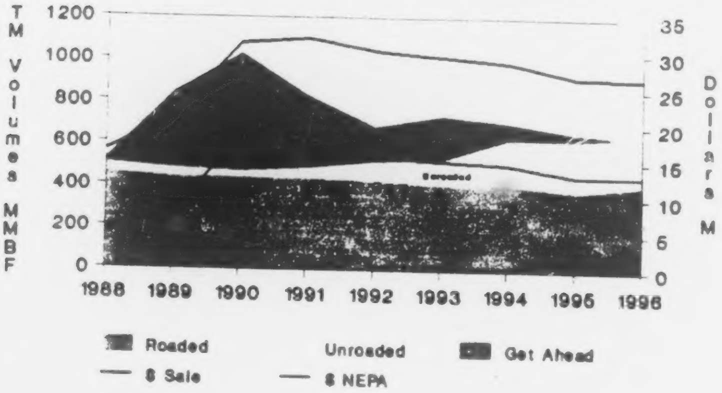
FY95		FY96		FY97				
ROAD	UN-ROAD	ROAD	UN-ROAD	ROAD	UN-ROAD			
7	17	7	17			BVHD	VOL	235
382	928	382	928	0	0		M$	16074
35	5	35	5	35	5	BTTR	VOL	414
930	133	930	133	930	133		M$	11462
3		3		3		CUST	VOL	71
97	0	97	0	97	0		M$	1445
15	9	17	9	17	9	DRLG	VOL	267
720	486	816	486	816	486		M$	12800
201		150		106		FTHD	VOL	1265
1754	0	0	0	0	0		M$	10392
9	10	9	10	9	10	GALL	VOL	310
153	200	153	200	153	200		M$	5442
9	6	10	5			HEL	VOL	185
482	356	536	297				M$	9944
226	9	220	0	225	0	KOOT	VOL	2234
2594	103	2526	0	2583	0		M$	26012
12	3	14	5			L&C	VOL	161
324	81	378	122				M$	4303
97	40	97	40			LOLO	VOL	1229
1150	680	1150	680				M$	15855
962	516	861	503	720	374		M$	14699
614	99	562	91	395	24	MONT	VOL	6371
713		653		419				
9548	3483	7829	3349	5299	1193		M$	128428
221	54	221	54	221	54	IPNF	VOL	2871
4200	1888	4200	1888	4200	1888		M$	60110
135	140	125	125	125	125	CLW	VOL	3258
1971	3181	1980	3039	2055	2939		M$	53115
70	30	70	35	70	35	NEZP	VOL	1102
1072	459	1025	506	1025	506		M$	14998
321	172	287	168	240	125		M$	4900
426	224	416	214	416	214	IDAHO	VOL	7231
650		630		630				
7564	5700	7492	5601	7520	5458		M$	133123
1040	323	978	305	811	238	R-1	VOL	13602
1363		1283		1049				
1282	688	1148	671	961	498		M$	19598
15829	8495	14173	8279	11859	6152		M$	241952
17111	9183	15321	8950	12820	6650		M$	261550

Timber Resource Strategies

Unconstrained Strategy - Regional Total
Vol Through NEPA & Vol Offered

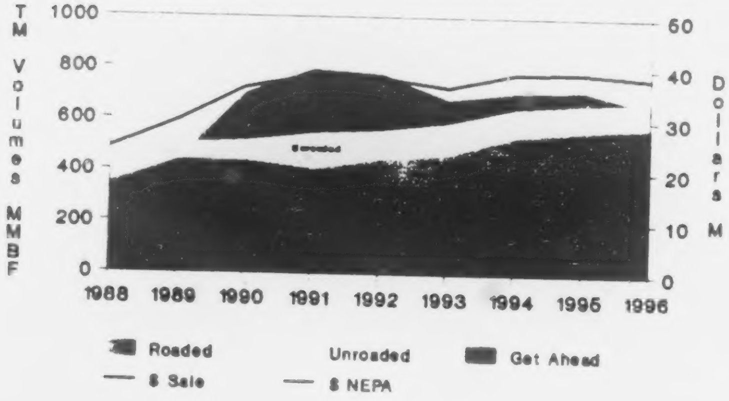


Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/23/89)



Timber Resource Strategies
Unconstrained Strategy - Idaho Total
Vol Through NEPA & Vol Offered

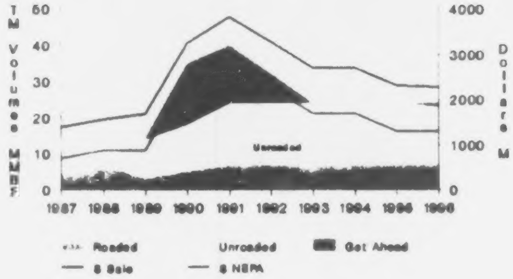
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/23/89)



Timber Resource Strategies
Unconstrained Strategy - Montana Total
Vol Through NEPA & Vol Offered

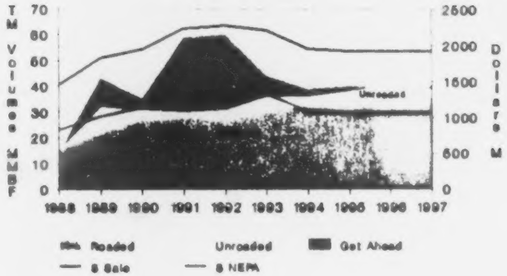
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/22/89)

Timber Resource Strategies
Unconstrained Strategy - Beaverhead NF
Vol Through NEPA & Vol Offered



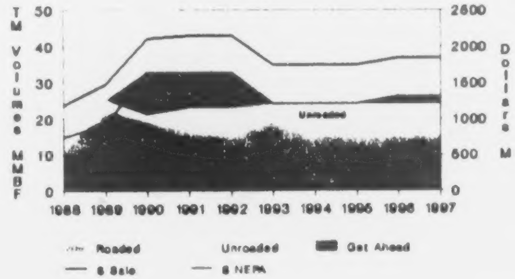
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/22/89)

Timber Resource Strategies
Unconstrained Strategy - Bitterroot NF
Vol Through NEPA & Vol Offered



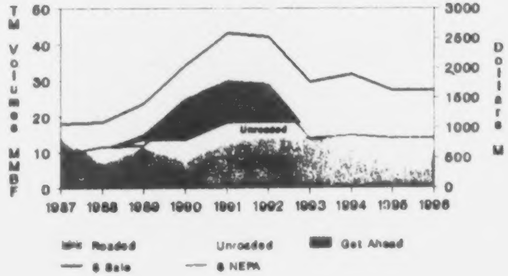
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/22/89)

Timber Resource Strategies
Unconstrained Strategy - Deerlodge NF
Vol Through NEPA & Vol Offered



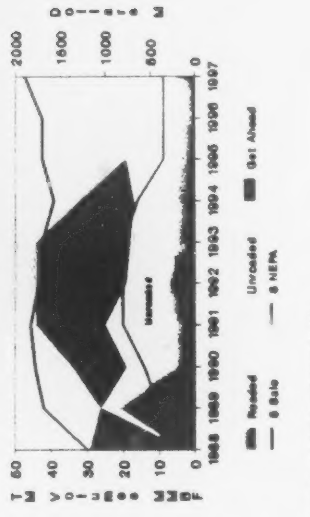
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/23/89)

Timber Resource Strategies
Unconstrained Strategy - Helena NF
Vol Through NEPA & Vol Offered



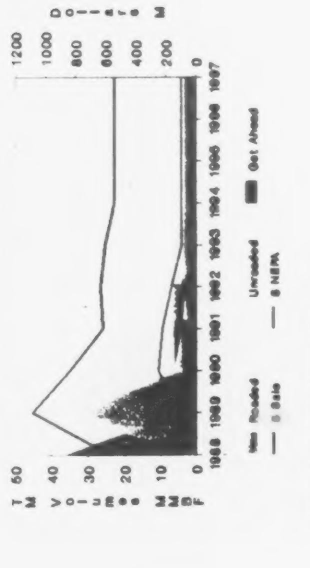
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/23/89)

Timber Resource Strategies
Unconstrained Strategy - Gallatin NF
Vol Through NEPA & Vol Offered



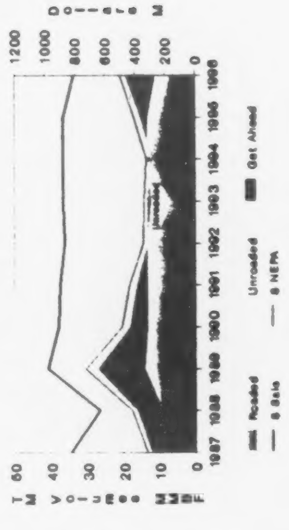
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (8/28/89)

Timber Resource Strategies
Unconstrained Strategy - Custer NF
Vol Through NEPA & Vol Offered



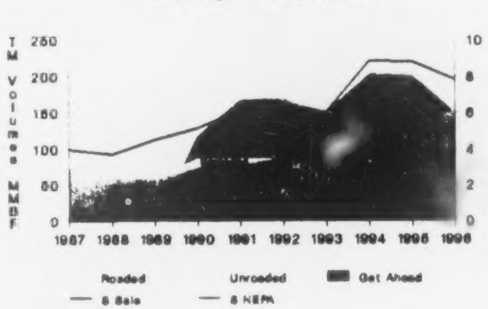
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (8/28/89)

Timber Resource Strategies
Unconstrained Strategy--Lewis & Clark NF
Vol Through NEPA & Vol Offered



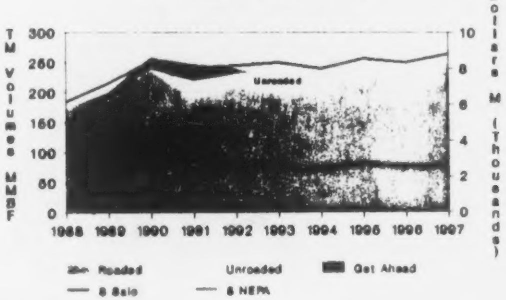
Summary of sale prep throug NEPA
Gate 2 volume offered from roaded and
unroaded and costs (8/23/89)

Timber Resource Strategies
Unconstrained Strategy - Flathead NF
Vol Through NEPA & Vol Offered



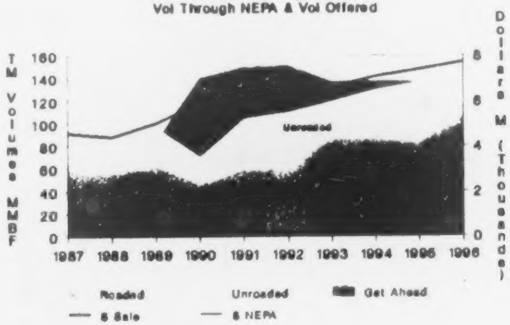
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (8/28/89)

Timber Resource Strategies
Unconstrained Strategy - Kootenai NF
Vol Through NEPA & Vol Offered

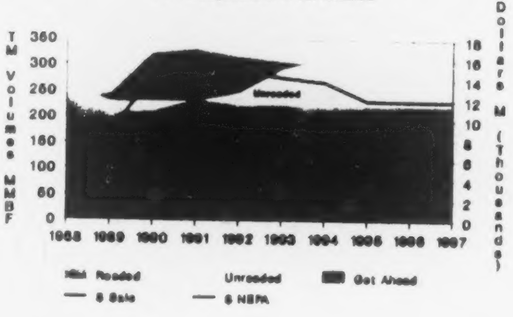


Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (8/28/89)

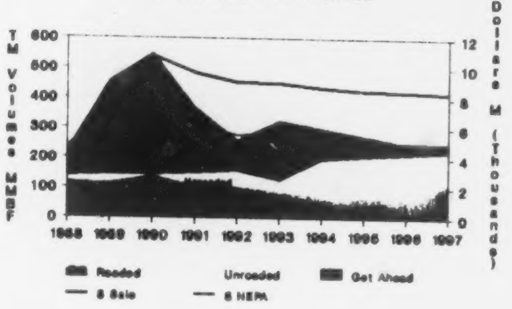
Timber Resource Strategies
Unconstrained Strategy - Lolo NF
Vol Through NEPA & Vol Offered



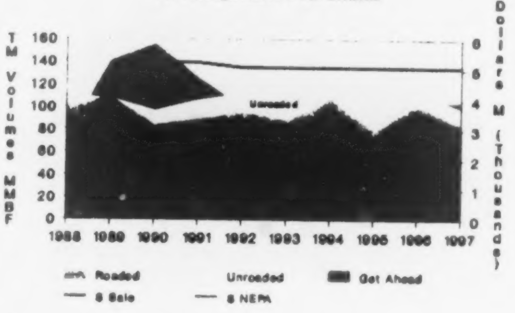
Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (8/23/89)


Timber Resource Strategies
Unconstrained Strategy - ID Panhandle NF
Vol Through NEPA & Vol Offered

Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/26/89)


Timber Resource Strategies
Unconstrained Strategy - Clearwater NF
Vol Through NEPA & Vol Offered

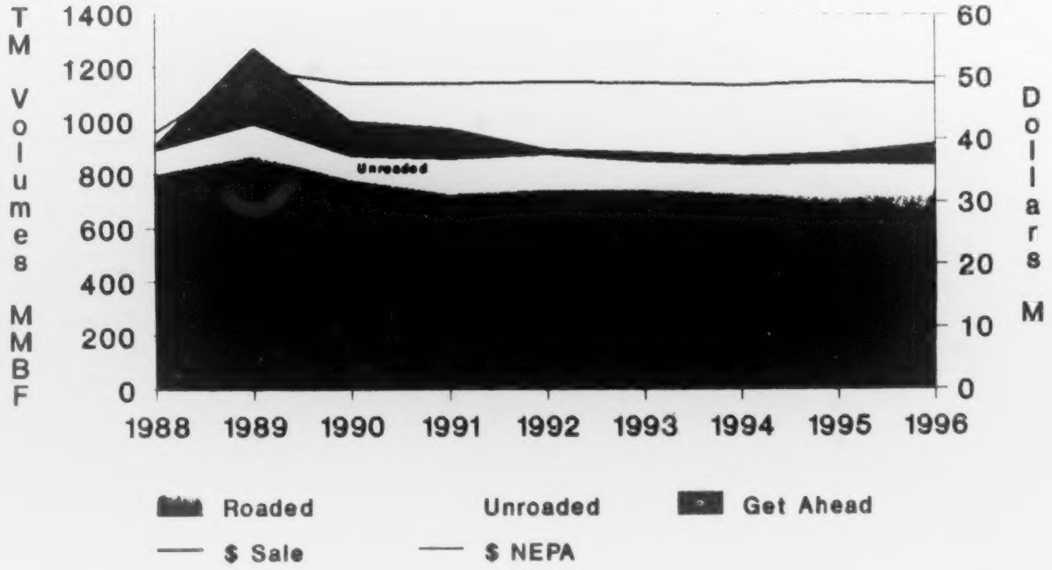
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/26/89)


Timber Resource Strategies
Unconstrained Strategy - Nez Perce NF
Vol Through NEPA & Vol Offered

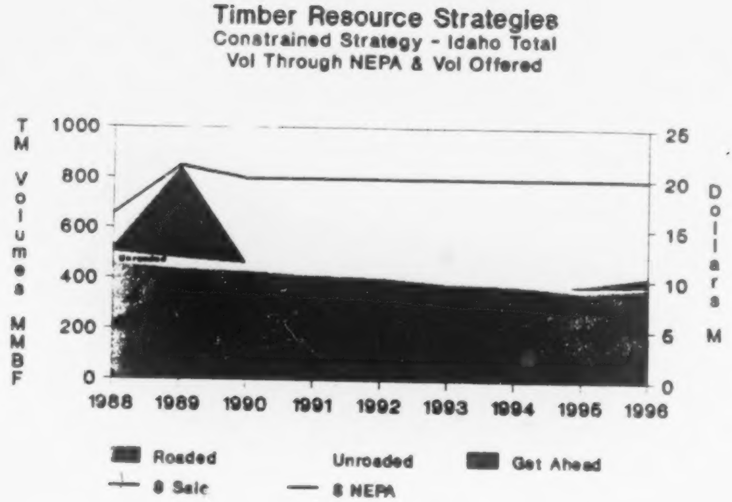
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (6/23/89)

Timber Resource Strategies

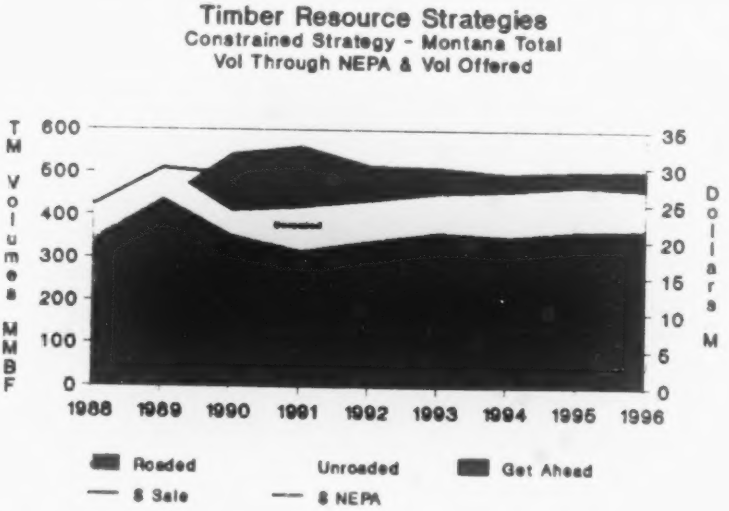
Constrained Strategy - Regional Total
Vol Through NEPA & Vol Offered



Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/22/89)

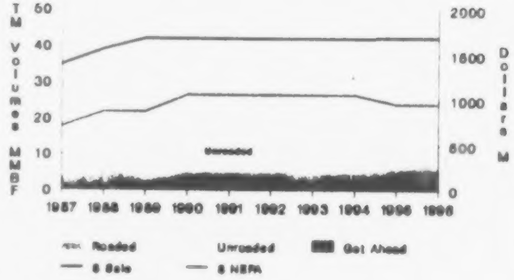


Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/22/89)



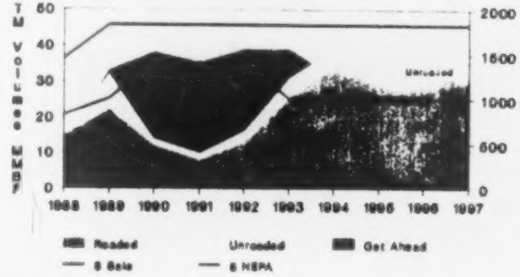
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/22/89)

Timber Resource Strategies
Constrained Strategy - Beaverhead NF
Vol Through NEPA & Vol Offered



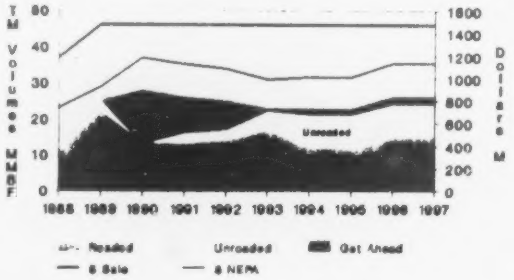
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (6/22/89)

Timber Resource Strategies
Constrained Strategy - Bitterroot NF
Vol Through NEPA & Vol Offered



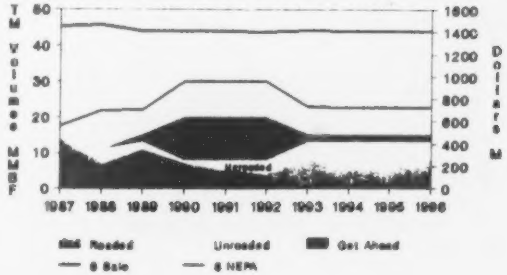
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (6/22/89)

Timber Resource Strategies
Constrained Strategy - Deerlodge NF
Vol Through NEPA & Vol Offered

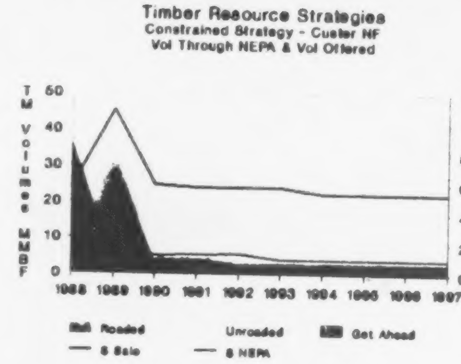


Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (6/23/89)

Timber Resource Strategies
Constrained Strategy - Helena NF
Vol Through NEPA & Vol Offered

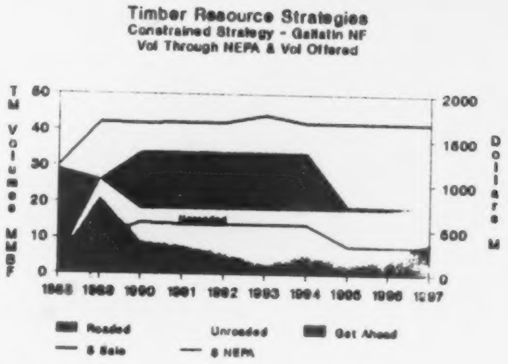


Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (6/23/89)



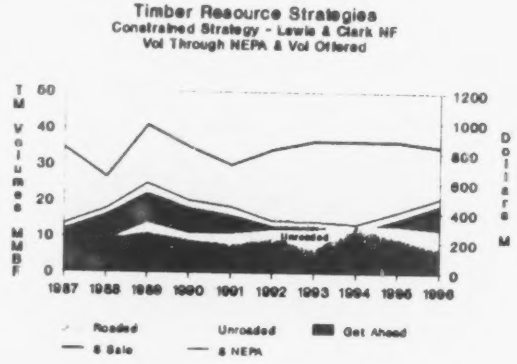
Timber Resource Strategies
Constrained Strategy - Custer NF
Vol Through NEPA & Vol Offered

Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs (6/26/89)



Timber Resource Strategies
Constrained Strategy - Gallatin NF
Vol Through NEPA & Vol Offered

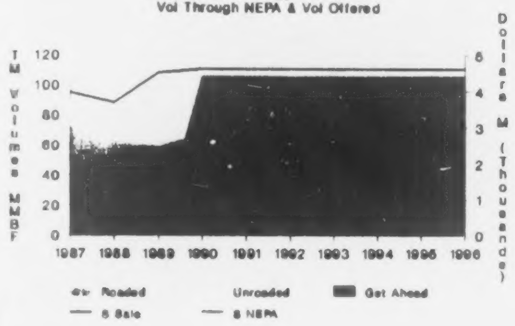
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/26/89)



Timber Resource Strategies
Constrained Strategy - Lewis & Clark NF
Vol Through NEPA & Vol Offered

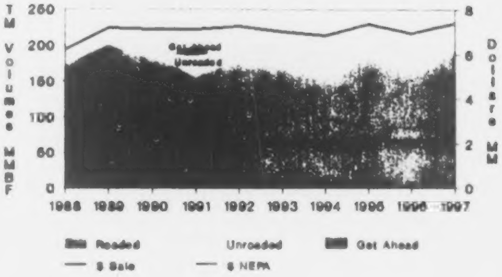
Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (6/23/89)

Timber Resource Strategies
Constrained Strategy - Flathead NF
Vol Through NEPA & Vol Offered



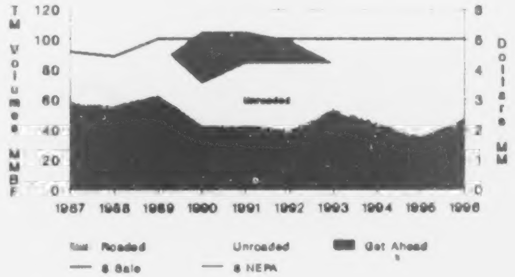
Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (6/28/89)

Timber Resource Strategies
Constrained Strategy - Kootenai NF
Vol Through NEPA & Vol Offered



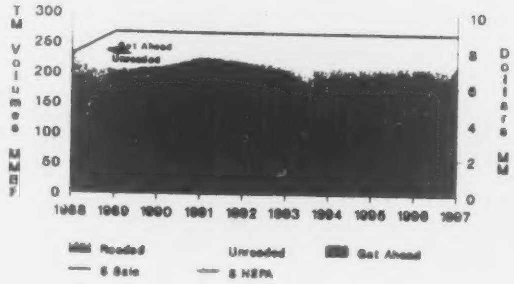
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/28/89)

Timber Resource Strategies
Constrained Strategy - Lolo NF
Vol Through NEPA & Vol Offered



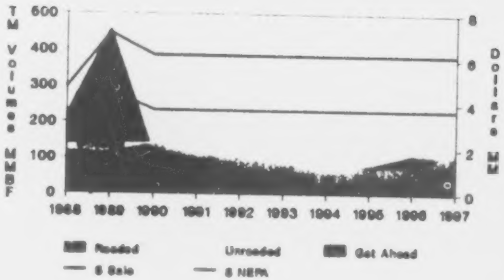
Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (6/23/89)

Timber Resource Strategies
Constrained Strategy - IPNF
Vol Through NEPA & Vol Offered



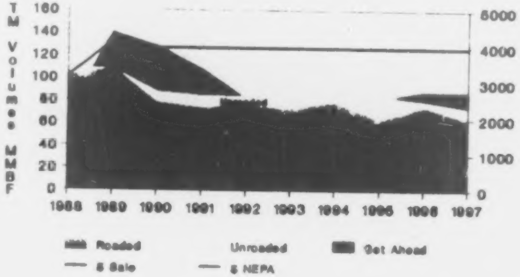
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/26/89)

Timber Resource Strategies
Constrained Strategy - Clearwater NF
Vol Through NEPA & Vol Offered



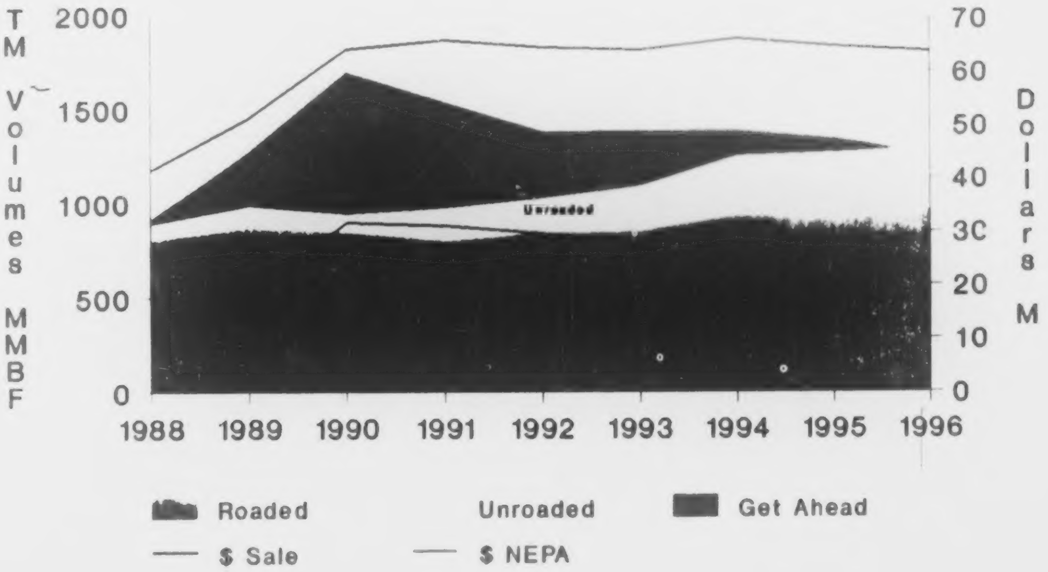
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (6/26/89)

Timber Resource Strategies
Constrained Strategy - Nez Perce NF
Vol Through NEPA & Vol Offered



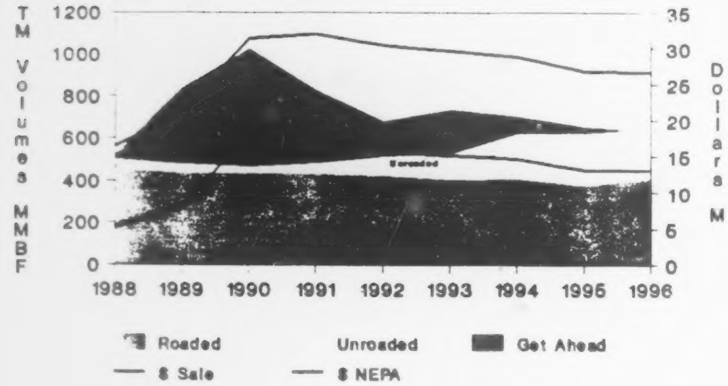
Summary of sale prep through NEPA
Gate 2 volume offered from roaded and
unroaded and costs (6/23/89)

Timber Resource Strategies
West-Side Emphasis - Regional
Vol Through NEPA & Vol Offered



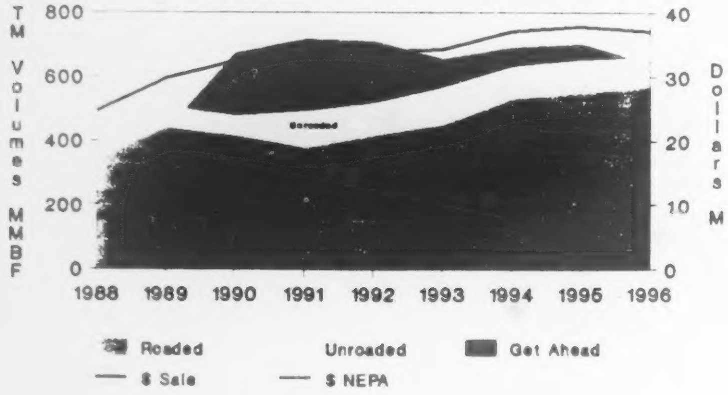
Summary of sale prep through NEPA Gate 2, volume offered from roaded and unroaded and costs. (5/23/89)

Timber Resource Strategies
West-Side Emphasis - Idaho
Vol Through NEPA & Vol Offered



Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/23/89)

Timber Resource Strategies
West-Side Emphasis - Montana
Vol Through NEPA & Vol Offered



Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs. (5/23/89)

Timber Resource Strategies
Unconstrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,807	181	161	20	109
MT	12,567	181	161	20	109
ID	240	0	0	0	0
1988 R-1	40,627	889	802	87	912
MT	24,280	388	348	40	388
ID	16,348	501	454	47	524
1989 R-1	50,892	984	870	114	1,278
MT	29,713	506	438	68	438
ID	21,179	478	432	46	840
1990 R-1	67,518	986	868	118	1,725
MT	36,114	518	435	83	701
ID	31,403	468	433	35	1,024
1991 R-1	70,550	1,032	835	197	1,616
MT	38,530	548	407	141	792
ID	32,020	484	428	56	824
1992 R-1	68,465	1,074	868	206	1,450
MT	38,055	561	445	116	774
ID	30,410	513	423	90	676
1993 R-1	65,793	1,119	868	251	1,410
MT	36,253	591	465	126	679
ID	29,540	528	403	125	731
1994 R-1	67,838	1270	945	325	1,407
MT	38,998	647	537	110	705
ID	28,840	623	408	215	702
1995 R-1	65,870	1294	932	362	1,363
MT	39,147	669	558	111	713
ID	26,722	625	374	251	650
1996 R-1	64,888	1,314	980	334	1,283
MT	38,217	673	575	98	653
ID	36.671	641	405	236	630
1997 R-1	49,599	984	832	256	1,049
MT	23,314	449	412	37	419
ID	26,284	535	420	219	630

Timber Resource Strategies
Unconstrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,807	181	161	20	109
MT	12,567	181	161	20	109
ID	240	0	0	0	0
1988 R-1	40,627	889	802	87	912
MT	24,280	388	348	40	388
ID	16,348	501	454	47	524
1989 R-1	50,892	984	870	114	1,278
MT	29,713	506	438	68	438
ID	21,179	478	432	46	840
1990 R-1	67,518	986	868	118	1,725
MT	36,114	518	435	83	701
ID	31,403	468	433	35	1,024
1991 R-1	70,550	1,032	835	197	1,616
MT	38,530	548	407	141	792
ID	32,020	484	428	56	824
1992 R-1	68,465	1,074	868	206	1,450
MT	38,055	561	445	116	774
ID	30,410	513	423	90	676
1993 R-1	65,793	1,119	868	251	1,410
MT	36,253	591	465	126	679
ID	29,540	528	403	125	731
1994 R-1	67,838	1270	945	325	1,407
MT	38,998	647	537	110	705
ID	28,840	623	408	215	702
1995 R-1	65,870	1294	932	362	1,363
MT	39,147	669	558	111	713
ID	26,722	625	374	251	650
1996 R-1	64,888	1,314	980	334	1,283
MT	38,217	673	575	98	653
ID	36,671	641	405	236	630
1997 R-1	49,599	984	832	256	1,049
MT	23,314	449	412	37	419
ID	26,284	535	420	219	630

Timber Resource Strategies
Constrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	13,199	181	161	20	109
MT	12,951	181	161	20	109
ID	248	0	0	0	0
1988 R-1	41,016	889	802	87	912
MT	24,661	388	348	40	388
ID	16,355	501	454	47	524
1989 R-1	50,892	984	870	114	1,273
MT	29,713	506	438	68	433
ID	21,179	478	432	46	840
1990 R-1	48,846	868	780	88	998
MT	28,889	409	353	56	545
ID	19,957	459	427	32	453
1991 R-1	48,810	857	728	129	974
MT	28,853	419	317	102	561
ID	19,956	438	411	27	413
1992 R-1	49,078	874	743	131	894
MT	29,118	434	341	93	517
ID	19,962	440	402	38	377
1993 R-1	48,989	847	741	106	881
MT	29,029	451	362	89	514
ID	19,959	396	379	17	367
1994 R-1	48,645	836	727	109	867
MT	28,692	457	353	104	500
ID	19,953	379	374	5	367
1995 R-1	49,229	839	717	122	883
MT	29,264	468	366	102	506
ID	19,964	371	351	20	377
1996 R-1	48,957	837	742	95	920
MT	28,998	460	370	90	507
ID	19,959	377	372	5	413
1997 R-1	39,749	749	710	39	779
MT	19,962	346	317	29	376
ID	19,787	403	393	10	403

Timber Resource Strategies
Constrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	13,199	181	161	20	109
MT	12,951	181	161	20	109
ID	248	0	0	0	0
1988 R-1	41,016	889	802	87	912
MT	24,661	388	348	40	388
ID	16,355	501	454	47	524
1989 R-1	50,892	984	870	114	1,273
MT	29,713	506	438	68	433
ID	21,179	478	432	46	840
1990 R-1	48,846	868	780	88	998
MT	28,889	409	353	56	545
ID	19,957	459	427	32	453
1991 R-1	48,810	857	728	129	974
MT	28,853	419	317	102	561
ID	19,956	438	411	27	413
1992 R-1	49,078	874	743	131	894
MT	29,118	434	341	93	517
ID	19,962	440	402	38	377
1993 R-1	48,989	847	741	106	881
MT	29,029	451	362	89	514
ID	19,959	396	379	17	367
1994 R-1	48,645	836	727	109	867
MT	28,692	457	353	104	500
ID	19,953	379	374	5	367
1995 R-1	49,229	839	717	122	883
MT	29,264	468	366	102	506
ID	19,964	371	351	20	377
1996 R-1	48,957	837	742	95	920
MT	28,998	460	370	90	507
ID	19,959	377	372	5	413
1997 R-1	39,749	749	710	39	779
MT	19,962	346	317	29	376
ID	19,787	403	393	10	403

Timber Resource Strategies

Westside Emphasis

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	13,185	181	161	20	109
MT	12,951	181	161	20	109
ID	234	0	0	0	0
1988 R-1	41,059	984	802	87	912
MT	24,652	506	348	40	388
ID	16,398	478	454	47	524
1989 R-1	50,837	947	870	114	1,273
MT	29,713	479	438	68	433
ID	21,124	468	432	46	840
1990 R-1	63,762	976	847	100	1,696
MT	32,415	492	414	65	672
ID	31,347	484	433	35	1,024
1991 R-1	65,365	1,032	804	172	1,538
MT	33,401	519	376	116	714
ID	31,964	513	428	56	824
1992 R-1	64,200	1,096	838	194	1,384
MT	33,813	568	415	104	708
ID	30,327	528	423	90	676
1993 R-1	63,711	1,256	851	245	1,385
MT	34,155	633	448	120	654
ID	29,556	623	403	125	731
1994 R-1	65,908	1,278	938	318	1,390
MT	37,099	653	530	103	688
ID	28,809	625	408	215	702
1995 R-1	64,542	1278	921	357	1,350
MT	37,835	653	547	106	700
ID	26,707	625	374	251	650
1996 R-1	63,780	1,302	972	330	1,271
MT	37,098	661	567	94	641
ID	26,682	641	405	236	630
1997 R-1	49,025	1,082	831	251	1,043
MT	22,795	443	411	32	413
ID	26,230	639	420	219	630

Timber Resource Strategies

Westside Emphasis

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	13,185	181	161	20	109
MT	12,951	181	161	20	109
ID	234	0	0	0	0
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ID	31,964	513	428	56	824
1992 R-1	64,200	1,096	838	194	1,384
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ID	30,327	528	423	90	676
1993 R-1	63,711	1,256	851	245	1,385
MT	34,155	633	448	120	654
ID	29,556	623	403	125	731
1994 R-1	65,908	1,278	938	318	1,390
MT	37,099	653	530	103	688
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Table of Contents

- Introduction
    - Assumptions
- Monitoring
    - Roads
    - ASQ
- NEPA Status
- Resource Strategies
    - Unconstrained Budget
    - Constrained Budget
    - West-Side Emphasis

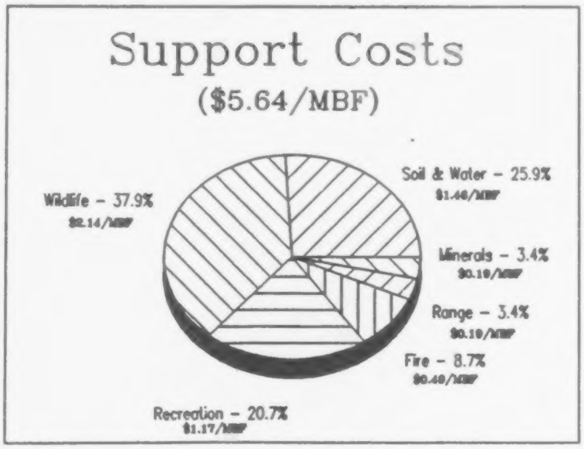
RESOURCE STRATEGIES

To implement Forest Plans, the Region charted a strategy to achieve decadal timber objectives and outputs. This multi-year schedule documents each Forest's strategy to meet Forest Plan objectives and outputs. The schedule will be used to evaluate and monitor accomplishment. As new information becomes available, it will be incorporated into the strategy.

This is the initial Timber Sale resource strategy for the Region and update as needed.

Assumptions used in developing this strategy follow:

- The F.Y. 1991 Forest Plan level submitted was 1,000 mmbf. Program and Legislation dictated we submit a program level of 1,170 mmbf which we cannot meet.
- Timber Sales require 6 years from concept to actual sale.
- Older Environmental Assessments will not require reworking.
- Adequate budgets.
- Wilderness resolution for access to roadless areas.
- Resolution of Litigation.
- Utilization standards need to include all volumes depicted in Forest Plan ASQ.
- If NEPA documents continue to be appealed, we will not meet ASQ.
- Support costs needed: $5.64/MBF.



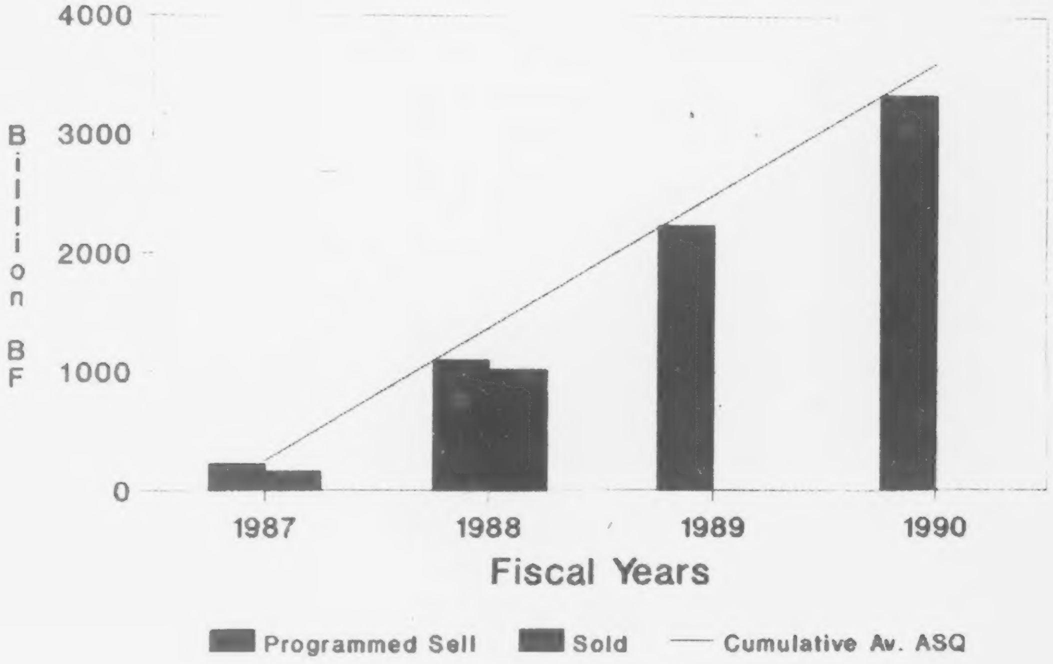
ASQ ACCOMPLISHMENT

FRP ROAD SUPPORT TO TIMBER

ISSUE: ASQ ACCOMPLISHMENT

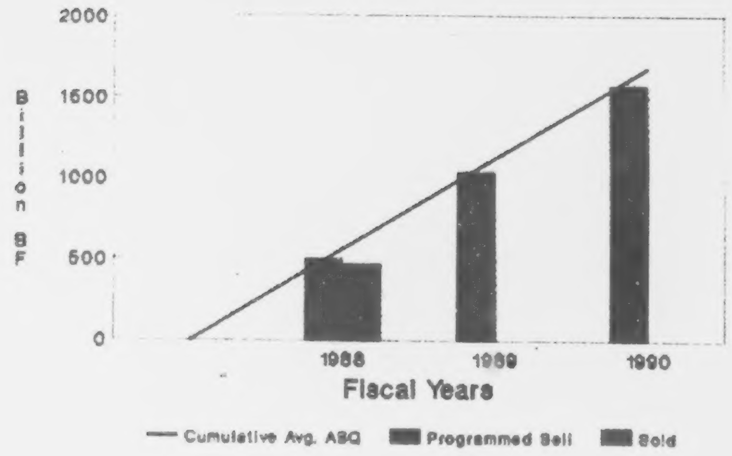
- In F.Y. 1987, five Forests with approved Forest Plans sold 166.9 mmbf chargeable to ASQ. Those Forests were the Beaverhead, Flathead, Helena, Lewis and Clark, and Lolo.
- In F.Y. 1988, all 13 Forest Plans were implemented. A total of 848.5 mmbf was sold that is chargeable to ASQ.
- As of October 1988, 1,015.4 mmbf has been sold that is chargeable to ASQ. This is 356.6 mmbf short of the average annual ASQ for the 2 years.

Region 1 Average ASQ



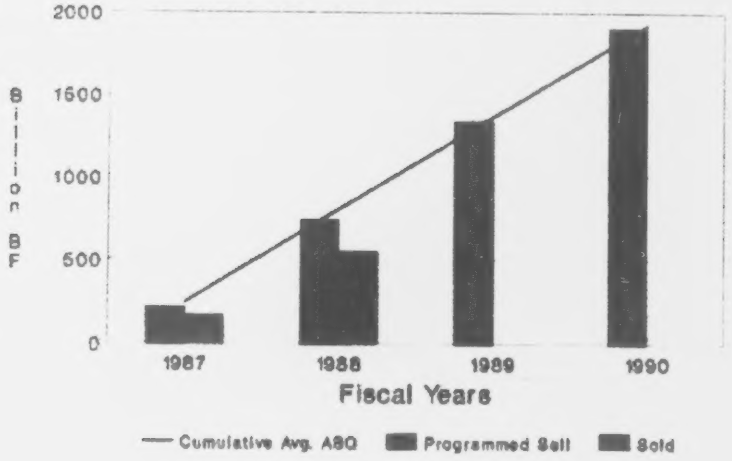
Data current as of 4/7/89

Idaho Average ASQ



Data current as of 4/7/89

Montana Average ASQ



Data current as of 4/7/89

April 7, 1989

ISSUE: FRP ROAD SUPPORT TO TIMBER

- Timeframe

  - 6 years from Timber Sale concept to completed roads.

  - Implications lack of access may cause ASQ short fall.

- History

  - F.Y. 86 to 88 timber access roads not built $34 million.

  - Short fall due to lack of funds and unroaded issues.

  - Drop in road funds $29 million from F.Y. 85 to 89. Must reverse.

- Sale Volume/FRP Support

  - 650 mmbf/$20 million FRP to support PC program.

  - Above 650 mmbf need $36,000/mmbf in roads.

- Unroaded vs. Roaded Areas

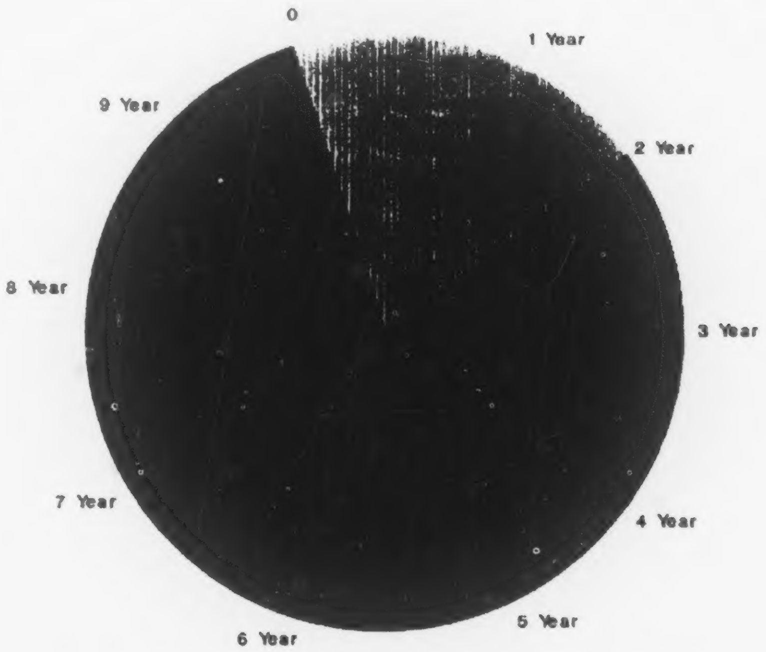
  The relationship between planned and accomplished road investments is approximately the same for roaded and unroaded areas.

- Future

  - Road data is soft due to past and future unroaded issues.

  - If anything, dollar needs are conservative.

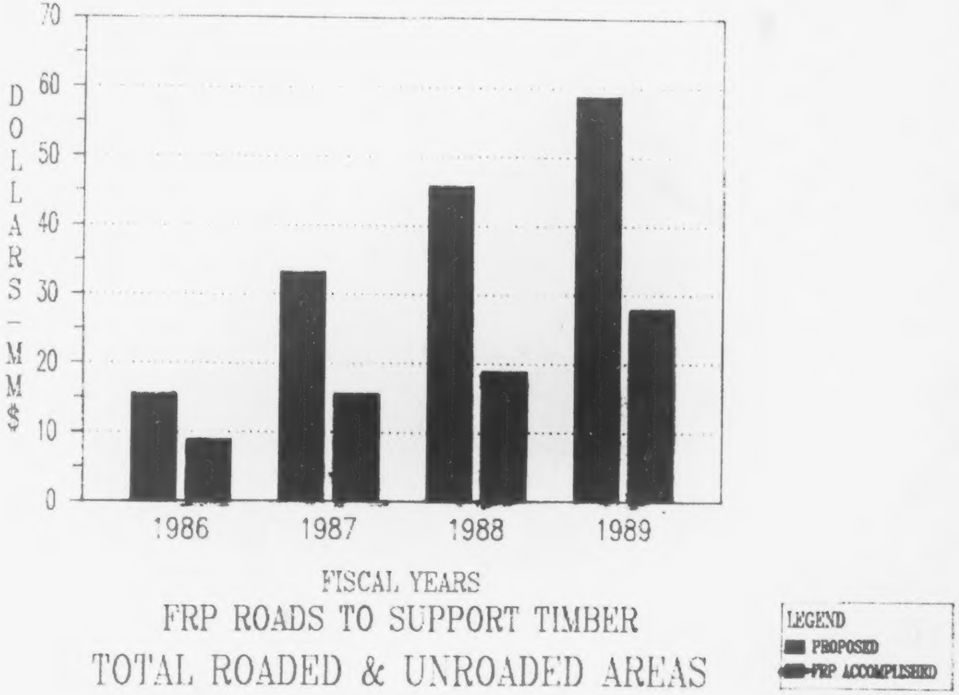
Region 1



Time Frame & Actions Required from Sale Concept Thru Harvest

REGION ONE – ACCUMULATIVE

PLANNED VS ACCOMPLISHED

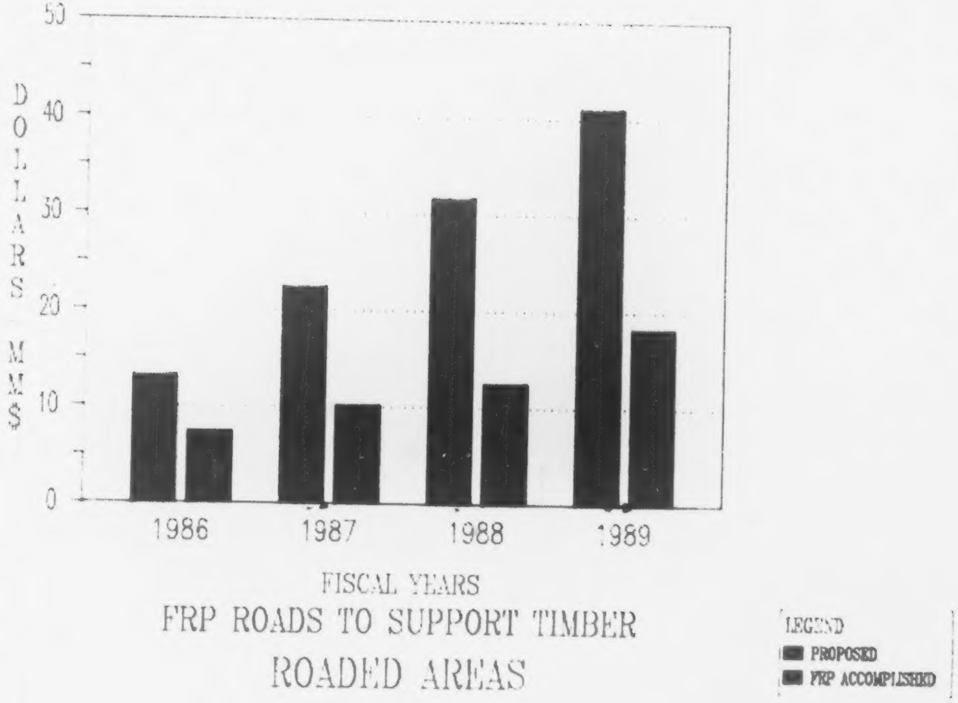


FRP ROADS TO SUPPORT TIMBER

TOTAL ROADED & UNROADED AREAS

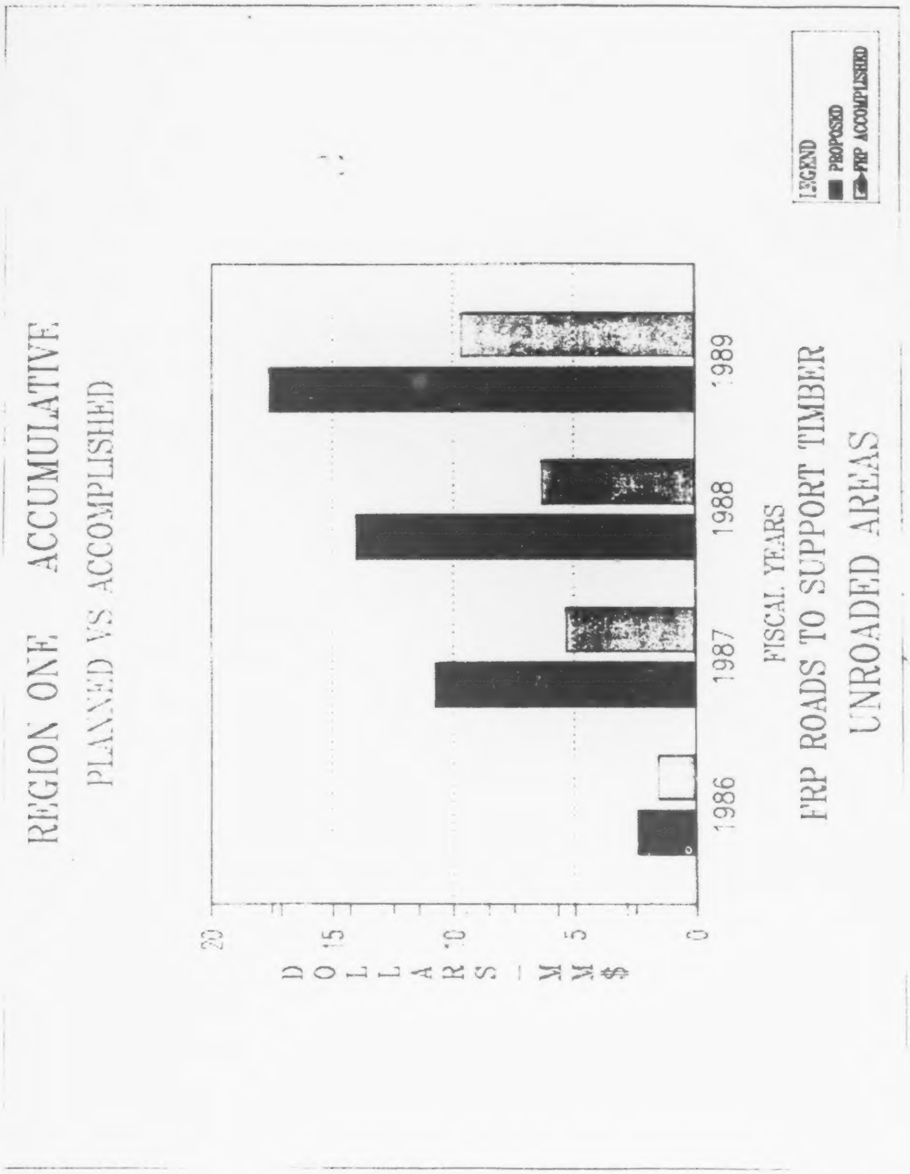
REGION ONE - ACCUMULATIVE

PLANNED VS ACCOMPLISHED



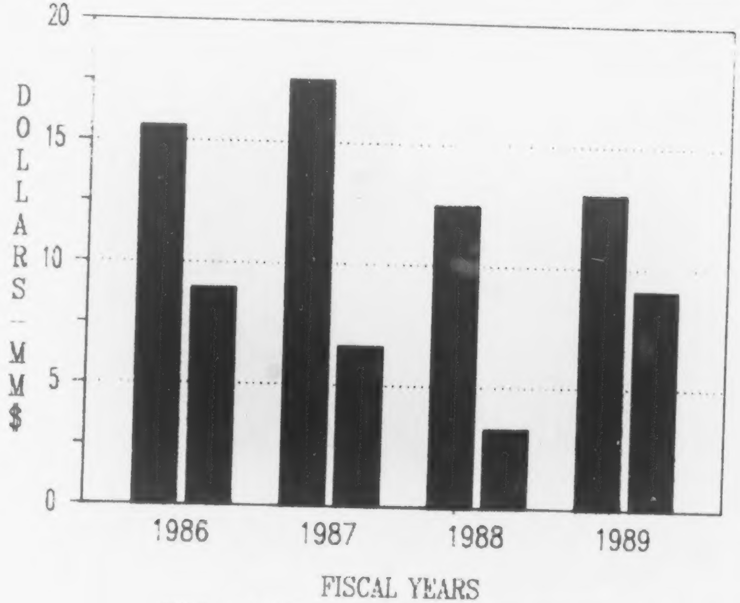
FRP ROADS TO SUPPORT TIMBER

ROADED AREAS


REGION ONE ACCUMULATIVE
PLANNED VS ACCOMPLISHED
DOLLARS - MM$
20
15
10
5
0
1986
1987
1988
1989
FISCAL YEARS
FRP ROADS TO SUPPORT TIMBER
UNROADED AREAS
LEGEND
■ PROPOSED
▨ FRP ACCOMPLISHED

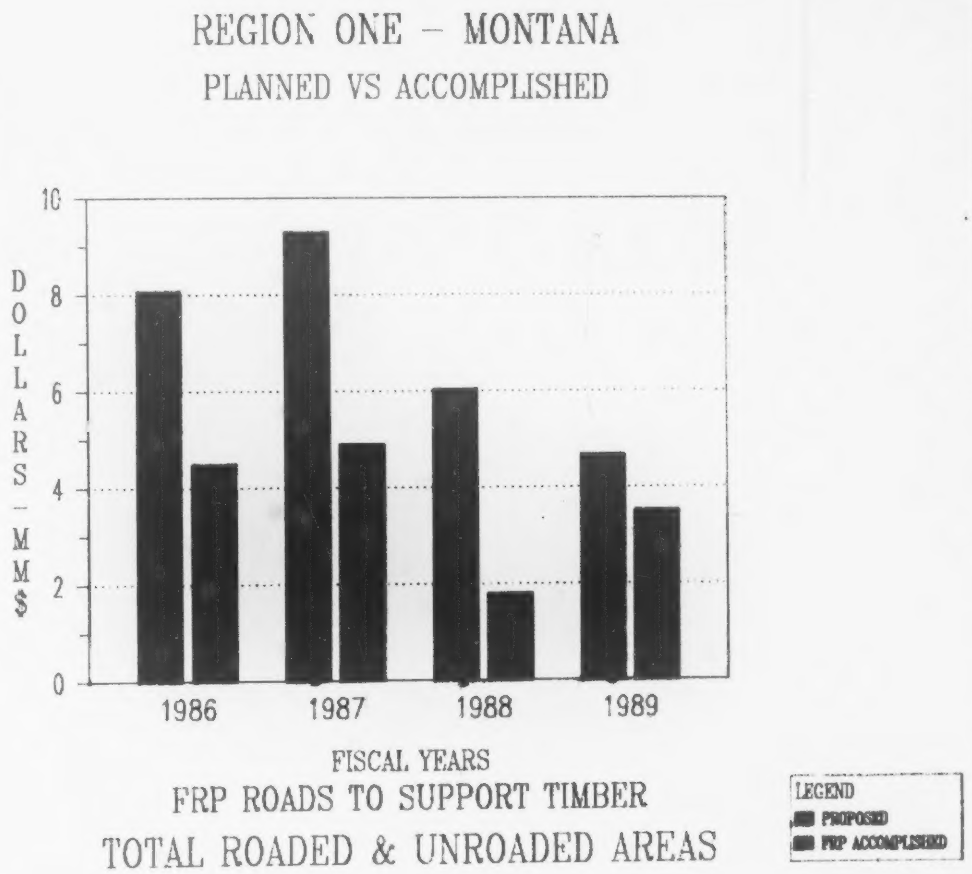
REGION ONE

PLANNED VS ACCOMPLISHED



FRP ROADS TO SUPPORT TIMBER

TOTAL ROADED & UNROADED AREAS



REGION ONE – MONTANA

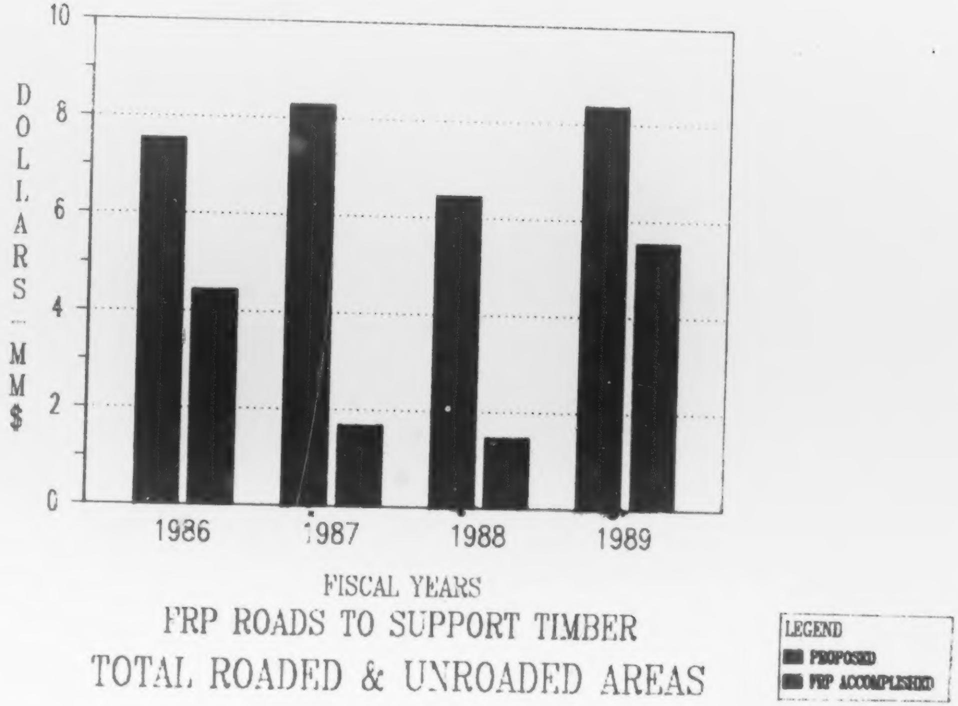
PLANNED VS ACCOMPLISHED

FRP ROADS TO SUPPORT TIMBER

TOTAL ROADED & UNROADED AREAS

REGION ONE – IDAHO

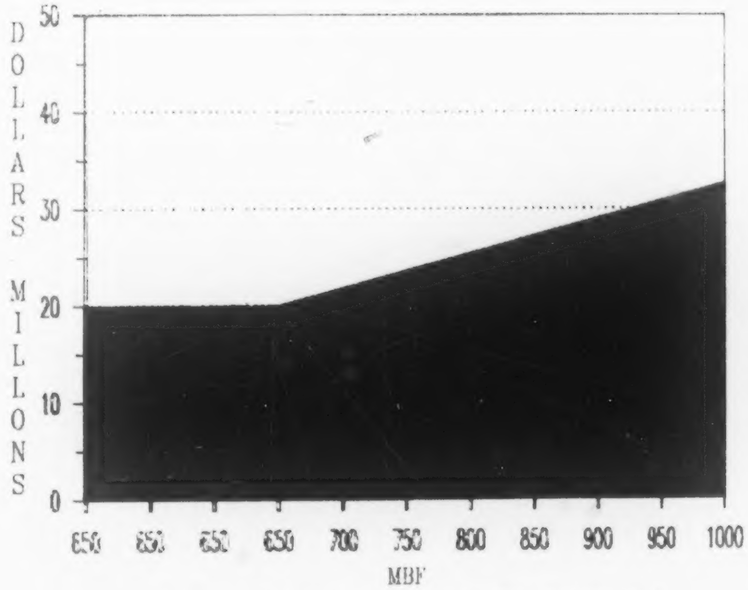
PLANNED VS ACCOMPLISHED



FRP ROADS TO SUPPORT TIMBER

TOTAL ROADED & UNROADED AREAS

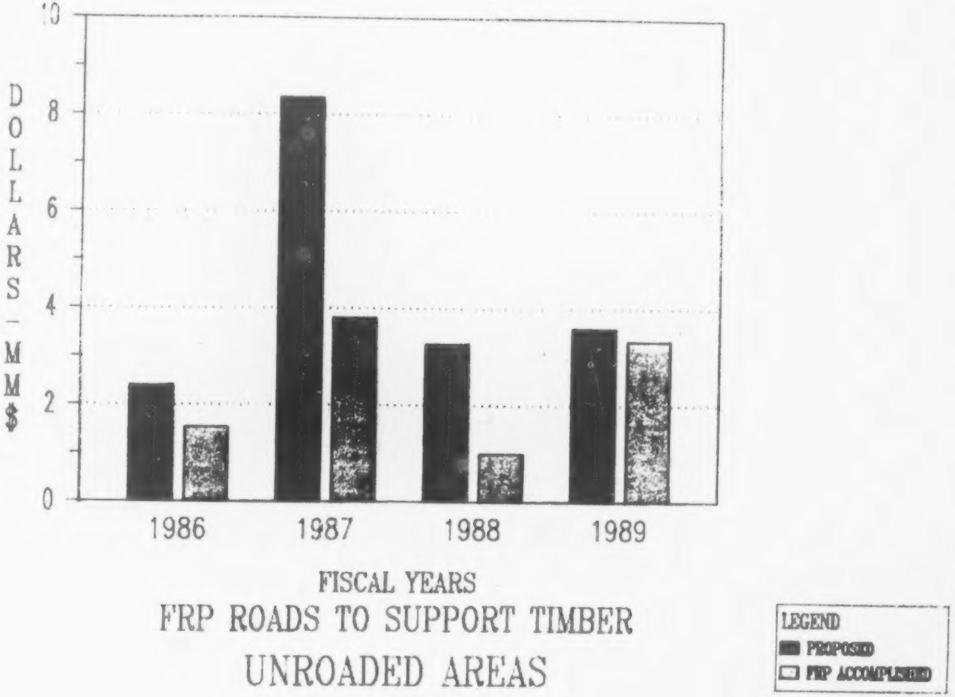
REGION ONE



FRP FUNDING NEEDED TO SUSTAIN
VARIOUS TIMBER SALE LEVELS

REGION ONE

PLANNED VS ACCOMPLISHED

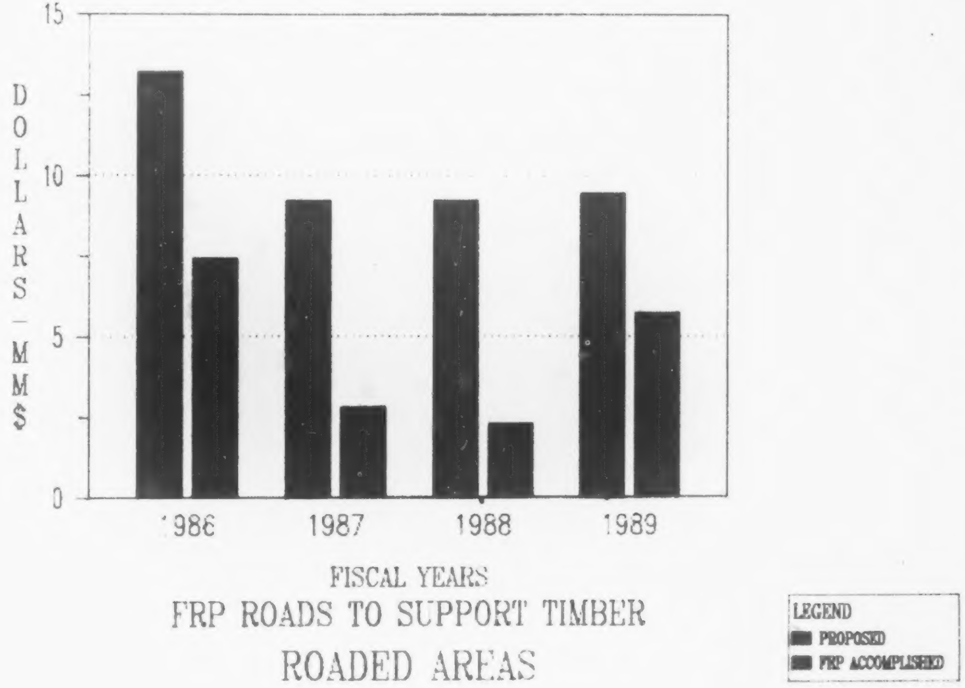


FRP ROADS TO SUPPORT TIMBER

UNROADED AREAS

REGION ONE

PLANNED VS ACCOMPLISHED



FRP ROADS TO SUPPORT TIMBER

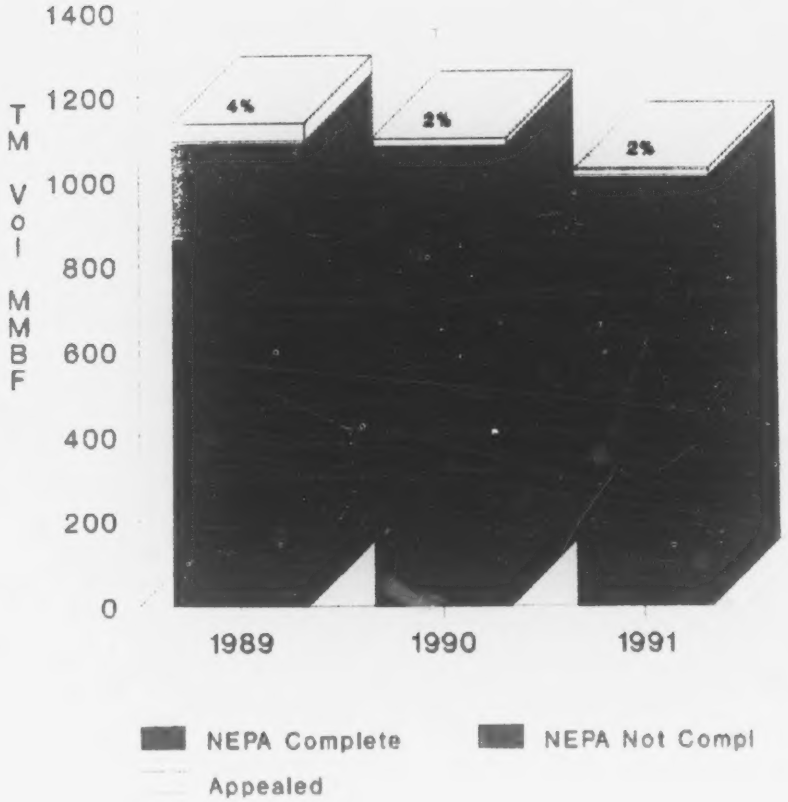
ROADED AREAS

NEPA STATUS

ISSUE: NEPA STATUS

- Decision Notices are not completed far enough in advance to go through appeals process, layout sales on the ground and meet sale schedules.
- As of March 1989 only 75 percent of the volume to be sold in F.Y. 1989 have NEPA decisions and are ready to sell. This should be 100 percent.
- As of March 1989 only 44 percent of the volume planned to sell in F.Y. 1990 have NEPA decisions completed. This should be near 90 percent.
- The Gallatin, Beaverhead, Flathead, Helena and Bitterroot National Forests have significant problems completing NEPA decisions.

Status of Timber Volume Total Northern Region



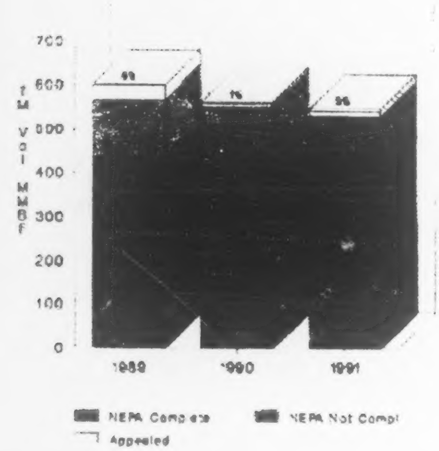
Data current as of 4/4/89

STARS 3-YEAR PROGRAM SUMMARY
4/04/89

REGIONAL

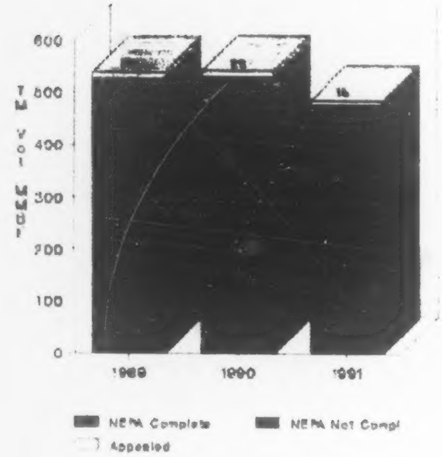
FISCAL YEAR	TARGET	AVG. ANN. ASQ	NEPA	NO NEPA	APPEALED
	(mmbf)	(mmbf)	(mmbf)	(mmbf)	(mmbf)
1989	1138.0	1120.6	856.8	236.0	45.1
1990	1100.0	1120.6	490.4	593.0	16.6
1991	1026.0	1120.6	348.0	659.2	18.8

Status of Timber Volume
Northern Region - Montana



Data current as of 4/4/89

Status of Timber Volume
Northern Region - Idaho



Data current as of 4/4/89

STARS 3-YEAR PROGRAM SUMMARY
4/04/89

MONTANA

FISCAL YEAR	TARGET	AVG. ANN. ASQ	NEPA	NO NEPA	APPEALED
	(mmbf)	(mmbf)	(mmbf)	(mmbf)	(mmbf)
1989	598.8	559.3	431.8	132.6	34.4
1990	559.3	559.3	189.7	363.1	6.5
1991	542.0	559.3	211.0	317.2	13.8

IDAHO

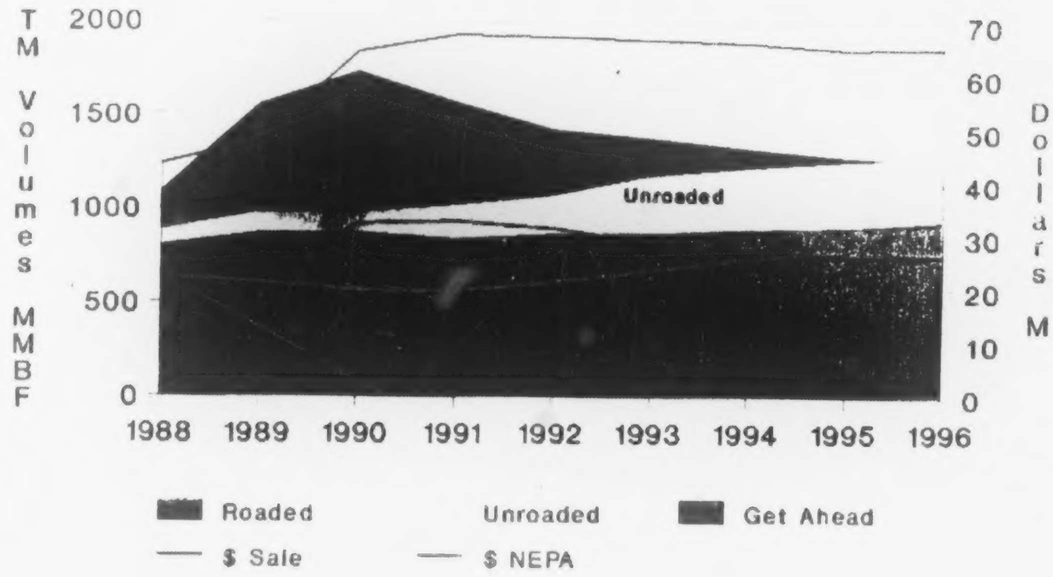
FISCAL YEAR	TARGET	AVG. ANN. ASQ	NEPA	NO NEPA	APPEALED
	(mmbf)	(mmbf)	(mmbf)	(mmbf)	(mmbf)
1989	539.2	561.3	425.0	103.4	10.8
1990	540.7	561.3	300.8	229.9	10.1
1991	484.0	561.3	137.0	342.0	5.0

STARS 3-YEAR PROGRAM SUMMARY BY FOREST
4/04/89

FOREST	YEAR	TARGET	AVG. ANN. ASQ	NEPA	NO NEPA	APPEALED
BVHD	89	23.8	17.3	8.3	9.1	6.4
	90	17.3	17.3	6.5	10.3	0.5
	91	24.0	17.3	9.6	14.4	0.0
BTR	89	32.0	33.4	7.4	18.6	6.0
	90	33.4	33.4	5.3	28.1	0.0
	91	30.0	33.4	0.0	30.0	0.0
IPNF	89	266.2	280.0	200.4	65.8	0.0
	90	270.0	280.0	196.1	63.8	10.1
	91	230.0	280.0	66.9	158.1	5.0
CLW	89	165.0	173.3	121.7	32.5	10.8
	90	162.7	173.3	76.6	86.1	0.0
	91	147.0	173.3	59.6	87.4	0.0
CUS	89	38.0	3.5	32.4	5.6	0.0
	90	3.5	3.5	0.0	3.5	0.0
	91	4.0	3.5	0.0	4.0	0.0
DRLG	89	25.0	23.0	23.2	1.8	0.0
	90	23.0	23.0	2.2	20.8	0.0
	91	23.0	3.0	0.9	22.1	0.0
THD	89	97.5	100.0	33.0	64.5	0.0
	90	100.0	100.0	4.0	96.0	0.0
	91	87.0	100.0	12.0	75.0	0.0
GAL	89	25.7	21.0	0.1	11.4	14.2
	90	21.0	21.0	0.2	14.8	6.0
	91	19.0	21.0	0.0	19.0	0.0
HEL	89	15.1	15.0	8.6	1.2	5.3
	90	15.0	15.0	0.0	15.0	0.0
	91	18.0	15.0	0.0	18.0	0.0
KOOT	89	224.3	227.0	214.8	9.5	0.0
	90	227.0	227.0	103.4	123.6	0.0
	91	219.0	227.0	139.9	65.3	13.8
L&C	89	15.1	12.1	6.0	6.6	2.5
	90	12.1	12.1	4.2	7.9	0.0
	91	13.0	12.1	6.1	6.9	0.0
LOLO	89	102.3	107.0	98.0	4.3	0.0
	90	107.0	107.0	63.9	43.1	0.0
	91	105.0	107.0	42.5	62.5	0.0
EZ	89	108.0	108.0	102.9	5.1	0.0
	90	108.0	108.0	28.0	80.0	0.0
	91	107.0	108.0	10.5	96.5	0.0

STRATEGIES

Timber Resource Strategies
Unconstrained Strategy - Regional Total
Vol Through NEPA & Vol Offered



Summary of sale prep through NEPA Gate 2, volume offered from roaded and unroaded and costs.

[illegible]1991 TIMBER SALE ION AND MANAGEMENT FORMULATION ALTERNATIVES AND DATA
[illegible]ATED AND VALIDATE
MAY 15

	NFTS		8,065	8,991	10,620	11,568	11,418	10,468	10,600		11,032	[illegible]	9,255	11,000	CHIEF S MINUS SP + 2 INCREMENT
	LMP		TSPQ Start Pt.	BASIC SP+1	SP+1+2 DEF	HIGH SP+1+2+1 DEF	FD&B ALT FOR CHIEF	LOWEST UNITCOST SP+1	TSPIRS OPTION SP+1	REDUCED SP+1	AR2 SP+1+2 DEP	AR1 SP+1+2 DEP	LMFBOT SP+1	CHIEF S AR SP+1+2 DEP	
[illegible]TION 1															
New Sales MMBF	1,000		679	796	879	879	879	796	796	796	879	879	796	879	0.00
Reoffer MMBF	0		0	0	0	0	0	0	0	0	0	0	0	0	0.00
Regular Offer MMBF	1,000		679	796	879	879	879	796	796	796	879	879	796	879	0.00
Salvage Offer MMBF	121		121	121	121	121	121	121	121	121	121	121	121	121	0.00
Total Offer MMBF	1,121	1,148	800	917	1,000	1,000	1,000	917	917	917	1,000	1,000	917	1,000	0.00
															0.00
Green Admin MMBF	1,014		1,014	1,014	1,014	1,014	1,014	1,014	1,014	1,014	1,014	1,014	1,014	1,014	0.00
Salvage Admin MMBF	121		121	121	121	121	121	121	121	121	121	121	121	121	0.00
Total Admin MMBF	1,135		1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135	0.00
															0.00
															0.00
TIMBER MANAGEMENT	906		906	906	906	906	906	906	906	906	900	906	906	906	0.00
Exam & Prescription $	10,559		8,143	8,786	9,545	10,559	10,559	8,786	8,786	8,786	9,545	9,545	8,786	9,545	0.00
Preparation $	19,120		9,224	10,852	16,777	21,198	21,198	10,852	10,852	10,852	16,777	16,777	10,852	16,777	0.00
Subtotal Exam & Prep $	29,679		17,367	19,639	26,322	31,757	31,757	19,639	19,639	19,639	26,322	26,322	19,639	26,322	0.00
Prep $/MBF	$29.68		$25.58	$24.67	$29.95	$36.13	$36.13	$24.67	$24.67	$24.67	$29.95	$29.95	$24.67	$29.95	0.00
	245		174	245	245	245	245	245	245	245	245	245	245	245	0.00
Harvest Admin $	6,694		6,694	6,694	6,694	6,694	6,694	6,694	6,694	6,694	6,694	6,694	6,694	6,694	0.00
Admin $/MBF (Harvest vol)	$5.90		$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	$5.90	0.00
															0.00
TOTAL TIMBER MGMT $	36,373		24,061	26,333	33,016	38,450	38,450	26,333	26,333	26,333	33,016	33,016	26,333	33,016	0.00
TM $/MBF (Reg offer vol)	$36.37		$35.44	$33.08	$37.56	$43.74	$43.74	$33.08	$33.08	$33.08	$37.56	$37.56	$33.08	$37.56	0.00
															0.00
															0.00
ENGINEERING TO SUPPORT TIMBER SALES															0.00
Forest Road Program $	33,259		18,115	21,952	27,171	33,312	33,312	21,952	21,952	21,952	27,171	27,171	21,952	27,171	0.00
Purchaser Elect $	1,146		926	1,058	1,146	1,146	1,146	1,058	1,058	1,058	1,146	1,146	1,058	1,146	0.00
(Purchaser Construct $)	13,316		10,654	12,204	13,316	13,316	13,316	12,204	12,204	12,204	13,316	13,316	12,204	13,316	0.00
															0.00
TOTAL ENGINEERING $	34,405		19,040	23,010	28,317	34,458	34,458	23,010	23,010	23,010	28,317	28,317	23,010	28,317	0.00
ENGINEERING $/MBF	$34.41		$28.04	$28.91	$32.22	$39.20	$39.20	$28.91	$28.91	$28.91	$32.22	$32.22	$28.91	$32.22	0.00
															0.00
															0.00
RESOURCE SUPPORT															0.00
Minerals $	170		110	127	145	170	170	127	127	127	145	145	127	145	0.00
(Landline $)	2,753		2,201	2,234	2,753	2,050	2,050	2,234	2,234	2,234	2,753	2,753	2,234	2,753	0.00
Fire Protect $	545		355	400	464	545	545	400	400	400	464	464	400	464	0.00
Recreation $	1,272		780	891	1,096	1,272	1,272	891	891	891	1,096	1,096	891	1,096	0.00
Wildlife/Fish $	2,364		1,637	1,874	1,996	2,364	2,364	1,874	1,874	1,874	1,996	1,996	1,874	1,996	0.00
Range $	211		136	159	180	211	211	159	159	159	180	180	159	180	0.00
Soil/Water $	1,580		1,035	1,183	1,347	1,560	1,580	1,183	1,183	1,183	1,347	1,347	1,183	1,347	0.00
															0.00
TOTAL SUPPORT $	6,142		4,052	4,643	5,229	6,142	6,142	4,643	4,643	4,643	5,229	5,229	4,643	5,229	0.00
SUPPORT $/MBF	$6.14		$5.97	$5.83	$5.95	$6.99	$6.99	$5.83	$5.83	$5.83	$5.95	$5.95	$5.83	$5.95	0.00
															0.00
															0.00
TOTAL REG OFFER $	76,920		47,154	53,986	66,562	79,050	79,050	53,986	53,986	53,986	66,562	66,562	53,986	66,562	0.00
OFFER $/MBF	$76.92		$69.45	$67.82	$75.72	$89.93	$89.93	$67.82	$67.82	$67.82	$75.72	$75.72	$67.82	$75.72	0.00
															0.00
SALVAGE SALE $	3,171		3,171	3,171	3,171	3,171	3,171	3,171	3,171	3,171	3,171	3,171	3,171	3,171	0.00
SSF $/MBF	$26.21		$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	$26.21	0.00
															0.00
TM TOTAL $	80,091		50,325	57,157	69,733	82,221	82,221	57,157	57,157	57,157	69,733	69,733	57,157	69,733	0.00
TM $/MBF	$71.45		$62.91	$62.33	$69.73	$82.22	$82.22	$62.33	$62.33	$62.33	$69.73	$69.73	$62.33	$69.73	0.00

TIMBER SALE PROGRAM SUP BY LEVEL PAGE

NAME /1/	NFS TOTAL	REGION 01	REGION 02	REGION 03	REGION	ION 05	REGION 06	REGION 08	REGION 09	REGION 10	TOTA
PURCHASER CONSTR.	145174.60	12204.00	3631.90	4706.00	2429.10	22233.00	67268.50	10933.00	3658.50	18110.60	.00
PURCHASER ELECT.	4301.10	1058.40	935.40	.00	110.20	213.80	1387.60	408.60	187.10	.00	.00
SUBTOTAL-RD CONSTR.	134389.20	22369.40	6790.40	6938.50	4243.20	18156.30	48047.00	13281.50	8154.20	419.80	5988.90
SPECIAL ACCOUNTS											
BRUSH DISPOSAL	65399.80	8160.90	994.30	1769.20	1893.10	15513.10	34368.20	.00	61.50	84.80	2556.70
TIMBER SAL. SALES	32577.90	3171.00	480.90	1946.00	978.80	4764.90	19786.00	402.80	283.30	385.80	378.40
TONG.TIM.SUP. FUND	42022.60	.00	.00	.00	.00	.00	.00	.00	.00	40373.40	1649.20
SUBTOTAL-SPEC.ACNTS	140000.30	11331.90	1475.20	3715.20	2871.90	20278.00	54152.20	402.80	344.80	40844.00	4584.30
TOTAL TIMBER PROG.	532288.60	64676.50	20478.90	22268.20	21303.10	79788.20	187882.30	41939.60	27911.60	42336.50	23703.70
TIMBER SALE PROG. VOL.											
NFS OFFER MMBF	7862.50	796.00	315.80	226.00	301.40	1384.80	3045.80	1100.10	690.60	2.00	.00
SSF OFFER MMBF	929.10	121.00	21.40	12.00	23.60	115.20	600.10	17.00	13.80	5.00	.00
TONGASS OFFER MMBF	343.00	.00	.00	.00	.00	.00	.00	.00	.00	343.00	.00
TOTAL OFFER MMBF	9134.60	917.00	337.20	238.00	325.00	1500.00	3645.90	1117.10	704.40	350.00	.00
NFS OFFER MMCF	1510.10	178.10	73.50	45.20	61.90	217.00	603.30	194.40	136.30	.40	.00
SSF OFFER MMCF	186.80	27.10	5.00	2.40	8.40	18.90	118.20	3.60	2.30	.90	.00
TONGASS OFFER MMCF	55.20	.00	.00	.00	.00	.00	.00	.00	.00	55.20	.00
TOTAL OFFER MMCF	1752.10	205.20	78.50	47.60	70.30	235.90	721.50	198.00	138.60	56.50	.00
NFS HARVEST MMBF	10686.30	1014.00	435.10	400.00	390.00	1637.70	4590.50	1383.00	834.00	2.00	.00
SSF HARVEST MMBF	1007.00	121.00	40.40	15.00	50.00	112.30	599.90	17.00	28.40	23.00	.00
TONGASS HARV. MMBF	375.00	.00	.00	.00	.00	.00	.00	.00	.00	375.00	.00
TOTAL HARVEST MMBF	12068.30	1135.00	475.50	415.00	440.00	1750.00	5190.40	1400.00	862.40	400.00	.00
NFS HARVEST MMCF	2047.90	226.80	101.20	80.00	73.00	256.60	898.70	245.60	165.60	.40	.00
SSF HARVEST MMCF	198.70	27.10	9.40	3.00	8.40	20.00	118.30	3.60	4.60	4.30	.00
TONGASS HARV. MMCF	70.60	.00	.00	.00	.00	.00	.00	.00	.00	70.60	.00
TOTAL HARVEST MMCF	2317.20	253.90	110.60	83.00	81.40	276.60	1017.00	249.20	170.20	75.30	.00
ST. PT. + INCS 1-2											
NATIONAL FOREST SYSTEM											
TIMBER SALE MGMT.	188093.40	26321.90	8267.90	9573.90	10868.10	28604.20	57151.00	21893.80	16662.10	995.30	7755.20
TIMBER HARVEST	76986.90	6693.80	3431.30	4180.60	3516.00	14745.70	28041.30	6979.10	3822.40	201.40	5375.30
SUBTOTAL - TIMBER	265080.30	33015.70 ✓	11699.20	13754.50	14384.10	43349.90	85192.30	28872.90	20484.50	1196.70	13130.50
SUPPORT TO TIMBER											
MINERAL SUPPORT	1486.70	145.20	12.70	63.60	5.30	442.00	777.00	14.40	25.40	1.10	.00
FIRE PROTECT. SUPP.	5260.30	464.30	181.30	190.80	125.10	1399.30	2820.70	37.50	41.30	.00	.00

TIMBER SALE PROGRAM SUM ' BY LEVEL

NAME /1/	NFS TOTAL	REGION 01	REGION 02	REGION 03	REGION	GION 05	REGION 06	REGION 08	REGION 09	REGION 10	TOT
RECREATION SUPPORT	13623.20	1098.10	661.50	1131.10	245.90	3217.10	4557.00	1647.20	1085.20	2.10	.00
WLDLF & FISH SUPP.	12770.50	1995.90	453.70	452.60	462.10	2941.50	4767.80	1090.60	803.10	3.20	.00
RANGE SUPPORT	1132.00	180.20	44.50	106.00	116.60	137.80	487.50	48.80	10.60	.00	.00
SOIL & WATER SUPP.	9731.50	1347.30	280.90	330.80	397.50	1823.20	4357.60	887.90	304.20	2.10	.00
SUBTOTAL - SUPPORT	44004.20	6229.00	1634.60	2274.90	1352.50	9960.90	17767.60	3726.40	2049.80	8.50	.00
TOTAL. NAT.FOR SVS.	309084.50	38244.70	13333.80	16029.40	15736.60	53310.80	102959.90	32599.30	22534.30	1205.20	13130.50
ROAD CONSTRUCTION											
FS ROAD CONSTR.	156411.20	(27171) ~~20095.40~~	6675.90	8562.70	5239.70	21409.00	57493.50	14199.10	10027.20	419.80	5988.90
PURCHASER CONSTR.	167753.90	13315.70	4490.80	5520.00	2975.30	24952.30	80536.00	13503.90	4349.30	18110.80	.00
PURCHASER ELECT.	4905.50	1146.10	1164.20	.00	144.50	213.80	1553.30	453.60	230.00	.00	.00
SUBTOTAL-RD CONSTR.	161316.70	27541.50	7840.10	8562.70	5384.20	21622.80	59048.80	14652.70	10257.20	419.80	5988.90
SPECIAL ACCOUNTS											
BRUSH DISPOSAL	65531.20	8160.90	1013.40	1769.20	2005.40	15513.10	34366.20	.00	61.50	84.80	2556.70
TIMBER SAL. SALES	32565.10	3171.00	480.90	1946.00	1000.00	4733.20	19786.00	400.50	283.30	385.80	378.40
TONG.TIM.SUP. FUND	45622.20	.00	.00	.00	.00	.00	.00	.00	.00	43973.00	1649.20
SUBTOTAL-SPEC.ACNTS	143716.50	11331.90	1494.30	3715.20	3005.40	20246.30	54152.20	400.50	344.80	44443.60	4584.30
TOTAL TIMBER PROG.	614119.70	77118.10	22668.20	28307.30	24126.20	95179.90	216158.90	47652.50	33136.30	46068.60	23703.70
TIMBER SALE PROG. VOL.											
NFS OFFER MMBF	10198.20	1009.00	378.50	388.00	375.40	1734.80	4151.10	1333.10	826.30	2.00	.00
SSF OFFER MMBF	930.10	121.00	21.40	12.00	24.60	115.20	600.10	17.00	13.80	5.00	.00
TONGASS OFFER MMBF	373.00	.00	.00	.00	.00	.00	.00	.00	.00	373.00	.00
TOTAL OFFER MMBF	11501.30	1130.00	399.90	400.00	400.00	1850.00	4751.20	1350.10	840.10	380.00	.00
NFS OFFER MMCF	1912.40	225.80	88.10	77.60	75.20	240.50	809.00	234.70	161.10	.40	.00
SSF OFFER MMCF	187.00	27.10	5.00	2.40	8.60	18.90	118.20	3.30	2.30	.90	.00
TONGASS OFFER MMCF	55.20	.00	.00	.00	.00	.00	.00	.00	.00	55.20	.00
TOTAL OFFER MMCF	2154.60	252.90	93.10	80.00	83.80	259.40	927.20	238.30	163.40	56.50	.00
NFS HARVEST MMBF	10811.30	1014.00	435.10	400.00	390.00	1762.70	4590.50	1383.00	834.00	2.00	.00
SSF HARVEST MMBF	1007.00	121.00	40.40	15.00	50.00	112.30	599.90	17.00	28.40	23.00	.00
TONGASS HARV. MMBF	375.00	.00	.00	.00	.00	.00	.00	.00	.00	375.00	.00
TOTAL HARVEST MMBF	12193.30	1135.00	475.50	415.00	440.00	1875.00	5190.40	1400.00	862.40	400.00	.00
NFS HARVEST MMCF	2067.50	226.80	101.20	80.00	73.00	276.20	898.70	245.60	165.60	.40	.00
SSF HARVEST MMCF	198.70	27.10	9.40	3.00	8.40	20.00	118.30	3.60	4.60	4.30	.00
TONGASS HARV. MMCF	70.60	.00	.00	.00	.00	.00	.00	.00	.00	70.60	.00
TOTAL HARVEST MMCF	2336.80	253.90	110.60	83.00	81.40	296.20	1017.00	249.20	170.20	75.30	.00

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                        PROGRAM DEVELOPMENT & BUDGET TIMBER REPORT 0                     DATE    4/14/89

                                         TIMBER SALE PROGRAM SUM     BY LEVEL            PAGE      6
 NAME /1/            NFS TOTAL   REGION 01 REGION 02 REGION 03 REGION L    JION 05 REGION 06 REGION 08 REGION 09 REGION 10 TOTA.
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ST. PT. + INCS 1-3
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NATIONAL FOREST SYSTEM
TIMBER SALE MGMT.     212380.30  31756.60  10357.20  11937.70  11969.50  29089.70  65414.80  24002.00  18977.20   1120.40   7755.20
TIMBER HARVEST         79045.90   6693.80   3459.90   4180.60   3548.90  15078.50  29059.90   7387.80   4038.60    222.60   5375.30
SUBTOTAL - TIMBER     291426.20  38450.40  13817.10  16118.30  15518.40  44168.20  94474.70  31389.80  23015.80   1343.00  13130.50

SUPPORT TO TIMBER
MINERAL SUPPORT         1685.00    169.60     12.70    116.60      5.30    514.10    820.50     16.50     28.60      1.10       .00
FIRE PROTECT. SUPP.     5839.50    544.90    205.70    210.90    133.60   1671.70   2954.30     53.80     46.60     18.00       .00
RECREATION SUPPORT     15206.50   1272.10    818.40   1565.70    278.80   3303.00   4643.90   2107.80   1206.20     10.60       .00
WLDLF & FISH SUPP.     16530.30   2363.70    494.00    501.40    586.10   5806.70   4835.60   1264.40    663.50     14.90       .00
RANGE SUPPORT           1271.70    210.90     51.90    117.70    144.20    179.10    491.70     65.60     10.60       .00       .00
SOIL & WATER SUPP.     10710.70   1580.50    304.20    365.80    513.00   2131.70   4438.20   1022.30    345.50      9.50       .00


SUBTOTAL - SUPPORT     51243.70   6141.70   1886.90   2878.10   1661.00  13606.30  18184.20   4530.40   2301.00     54.10       .00


TOTAL, NAT.FOR SYS.   342669.90  44592.10  15704.00  18996.40  17179.40  57774.50 112658.90  35920.20  25316.80   1397.10  13130.50

ROAD CONSTRUCTION
FS ROAD CONSTR.       181948.80  32497.10   8924.10  14501.70   6076.50  21409.00  63555.90  17027.40  11548.40    419.80   5988.90
PURCHASER CONSTR.     168304.50  13315.70   5673.20   5727.70   3036.30  24952.30  81913.30  14367.50   4645.90  14672.80       .00
PURCHASER ELECT.        5265.80   1146.10   1459.30       .00    144.50    213.80   1553.30    453.60    295.20       .00       .00


SUBTOTAL-RD CONSTR.   187214.60  33643.20  10383.40  14501.70   6221.00  21622.80  65109.20  17481.00  11843.60    419.80   5988.90

SPECIAL ACCOUNTS
BRUSH DISPOSAL         65389.10   8160.90   1034.60   1769.20   2115.60  15224.80  34366.20       .00     61.50     99.60   2556.70
TIMBER SAL. SALES      32455.00   3171.00    515.80   1946.00   1000.00   4619.00  19786.00    401.40    283.30    354.10    378.40
TONG.TIM.SUP. FUND     44697.50       .00       .00       .00       .00       .00       .00       .00       .00  43048.30   1649.20


SUBTOTAL-SPEC.ACNTS   142541.60  11331.90   1550.40   3715.20   3115.60  19843.80  54152.20    401.40    344.80  43502.00   4584.30


TOTAL TIMBER PROG.    672426.10  89567.20  27637.80  37213.30  26516.00  99241.10 231920.30  53802.60  37505.20  45318.90  23703.70

TIMBER SALE PROG. VOL.
NFS OFFER      MMBF    10503.30   1049.00    443.70    431.00    385.40   1734.80   4203.30   1348.50    901.30      6.30       .00
SSF OFFER      MMBF      935.80    121.00     24.10     12.00     24.60    115.20    600.10     17.00     13.80      8.00       .00
TONGASS OFFER MMBF       450.00       .00       .00       .00       .00       .00       .00       .00       .00    450.00       .00
TOTAL OFFER    MMBF    11889.10   1170.00    467.80    443.00    410.00   1850.00   4803.40   1365.50    915.10    464.30       .00


NFS OFFER      MMCF     1985.60    234.70    103.30     86.20     77.30    251.50    818.40    237.00    176.00      1.20       .00
SSF OFFER      MMCF      188.20     27.10      5.60      2.40      8.60     18.90    118.20      3.60      2.30      1.50       .00
TONGASS OFFER MMCF        84.80       .00       .00       .00       .00       .00       .00       .00       .00     84.80       .00
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                                        [illegible]                                      DATE     4/14/89

                                        TIMBER SALE PROGRAM SI      BY LEVEL                    PAGE      7

 NAME /1/             NFS TOTAL   REGION 01 REGION 02 REGION 03 REGION .    .GION 05 REGION 06 REGION 08 REGION 09 REGION 10 TOTAL
==============- .=========================================================================================================
TOTAL OFFER    MMCF    2258.60    261.80    108.90     88.60     85.90    270.40    936.60    240.60    178.30     87.50       .00

NFS HARVEST    MMBF   10815.60   1014.00    435.10    400.00    390.00   1762.70   4590.50   1383.00    834.00      6.30       .00
SSF HARVEST    MMBF    1007.00    121.00     40.40     15.00     50.00    112.30    599.90     17.00     28.40     23.00       .00
TONGASS HARV.  MMBF     450.00       .00       .00       .00       .00       .00       .00       .00       .00    450.00       .00
TOTAL HARVEST  MMBF   12272.60   1135.00    475.50    415.00    440.00   1875.00   5190.40   1400.00    862.40    479.30       .00

NFS HARVEST    MMCF    2068.30    226.80    101.20     80.00     73.00    276.20    898.70    245.60    165.60      1.20       .00
SSF HARVEST    MMCF     194.40     27.10      9.40      3.00      8.40     20.00    118.30      3.60      4.60       .00       .00
TONGASS HARV.  MMCF      84.70       .00       .00       .00       .00       .00       .00       .00       .00     84.70       .00
TOTAL HARVEST  MMCF    2347.40    253.90    110.60     83.00     81.40    296.20   1017.00    249.20    170.20     85.90       .00

---/1/ DOES NOT INCLUDE SUM_REFORESTATION, TIMBER STAND IMPROVEMENT COSTS, OR SUM_RESEARCH
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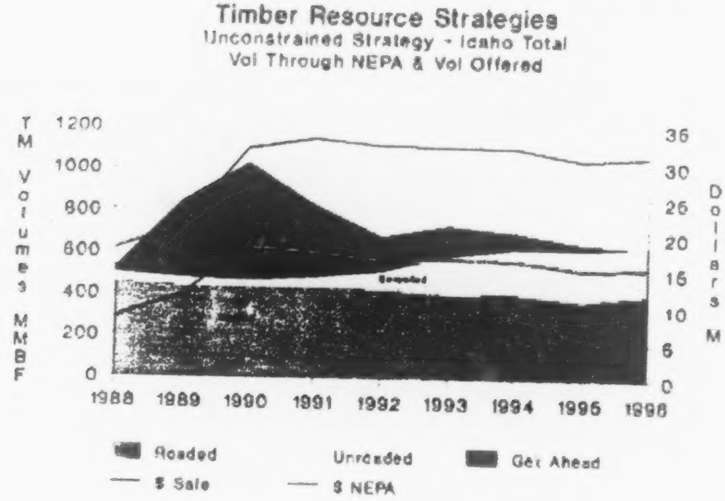
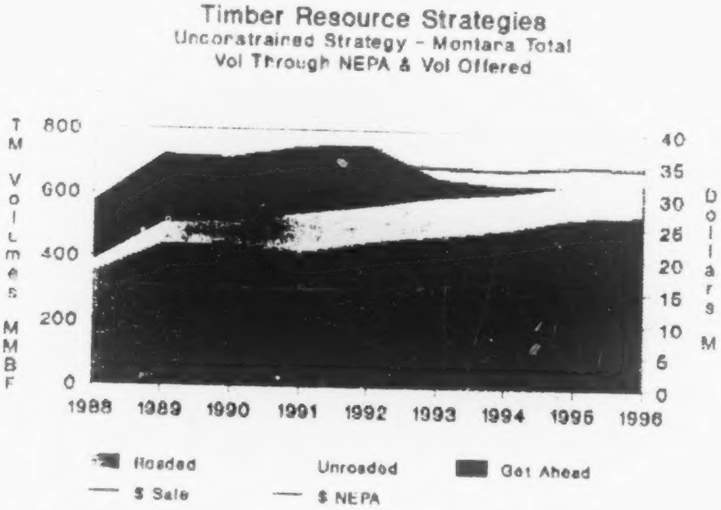
Timber Resource Strategies
Unconstrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,423	184	164	20	183
MT	12,190	184	164	20	183
ID	232	0	0	0	0
1988 R-1	43,289	888	802	86	1,094
MT	25,478	387	348	39	570
ID	17,811	501	454	47	524
1989 R-1	47,931	987	868	118	1,558
MT	26,734	509	436	72	718
ID	21,198	478	432	46	840
1990 R-1	64,485	985	873	112	1,733
MT	32,490	517	440	77	709
ID	31,995	468	433	35	1,024
1991 R-1	67,553	1,026	840	187	1,569
MT	34,219	542	412	131	745
ID	33,334	484	428	56	824
1992 R-1	67,300	1,078	869	209	1,426
MT	34,867	565	446	119	750
ID	32,432	513	423	90	676
1993 R-1	66,701	1,185	871	314	1,381
MT	34,368	597	468	129	650
ID	32,333	588	403	185	731
1994 R-1	66,223	1232	895	338	1,331
MT	33,985	609	487	123	629
ID	32,238	623	408	215	702
1995 R-1	65,009	1265	904	361	1,286
MT	34,632	640	530	110	636
ID	30,467	625	374	251	650
1996 R-1	65,469	1283	943	339	1,267
MT	34,467	642	538	103	637
ID	31,004	641	405	236	630
1997 R-1	46,703	982	723	260	958
MT	15,522	343	303	41	328
ID	31,182	639	420	219	630



Timber Resource Strategies
Unconstrained Strategy - Idaho Total
Vol Through NEPA & Vol Offered

Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs.



Timber Resource Strategies
Unconstrained Strategy - Montana Total
Vol Through NEPA & Vol Offered

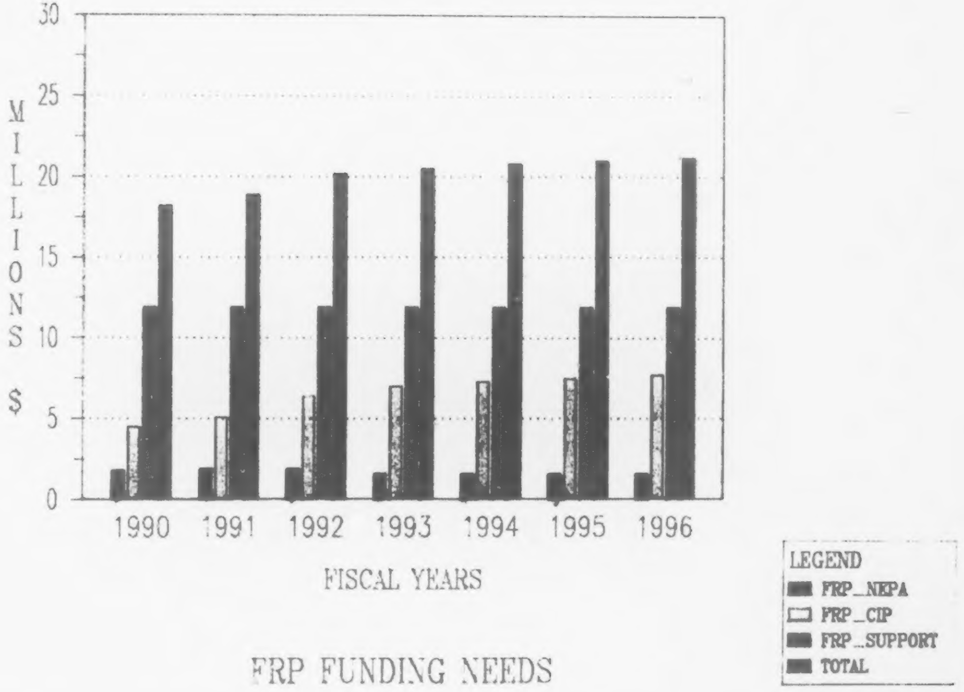
Summary of sale prep through NEPA
Gate 2, volume offered from roaded and
unroaded and costs

Timber Resource Strategies
Unconstrained

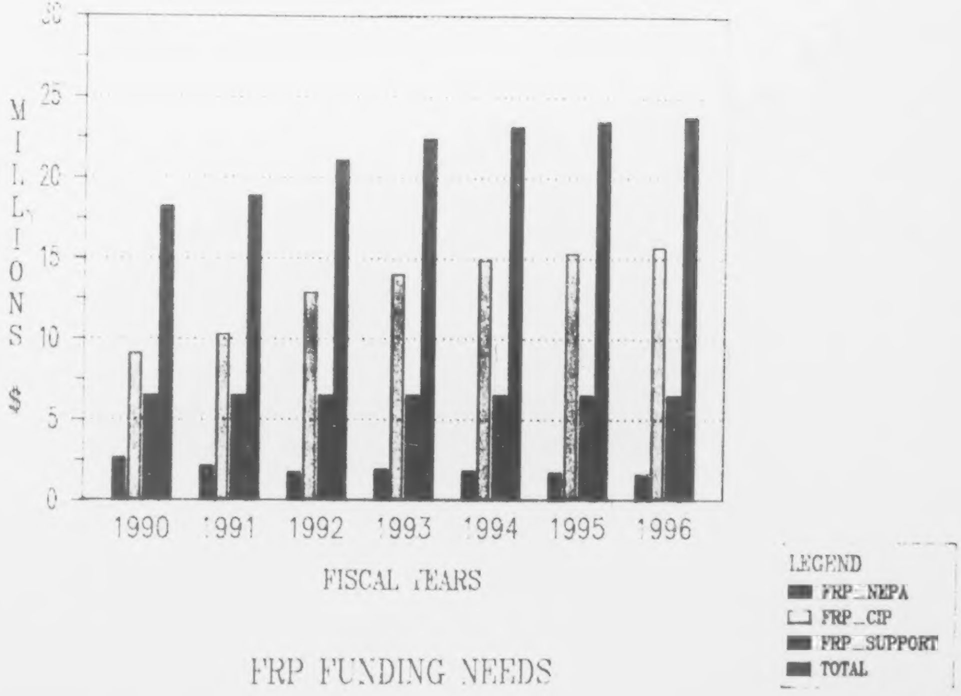
	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,423	184	164	20	163
MT	12,130	184	164	20	163
ID	232	0	0	0	0
1988 R-1	43,289	888	802	86	1,094
MT	25,478	387	348	39	570
ID	17,811	501	454	47	524
1989 R-1	47,931	987	868	118	1,558
MT	26,734	509	436	72	718
ID	21,198	478	432	46	840
1990 R-1	64,485	985	873	112	1,733
MT	32,490	517	440	77	709
ID	31,995	468	433	35	1,024
1991 R-1	67,553	1,026	840	187	1,569
MT	34,219	542	412	131	745
ID	33,334	484	428	56	824
1992 R-1	67,300	1,078	869	209	1,426
MT	34,867	565	446	119	750
ID	32,432	513	423	90	676
1993 R-1	66,701	1,185	871	314	1,381
MT	34,368	597	468	129	650
ID	32,333	588	403	185	731
1994 R-1	66,223	1232	895	338	1,331
MT	33,985	609	487	123	629
ID	32,238	623	408	215	702
1995 R-1	65,009	1265	904	361	1,286
MT	34,632	640	530	110	636
ID	30,467	625	374	251	650
1996 R-1	65,469	1283	943	339	1,267
MT	34,467	642	538	103	637
ID	31,004	641	405	236	630
1997 R-1	46,703	982	723	260	958
MT	15,522	343	303	41	328
ID	31,182	639	420	219	630

UNCONSTRAINED

MONTANA



FRP FUNDING NEEDS



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FRP FUNDING NEEDS

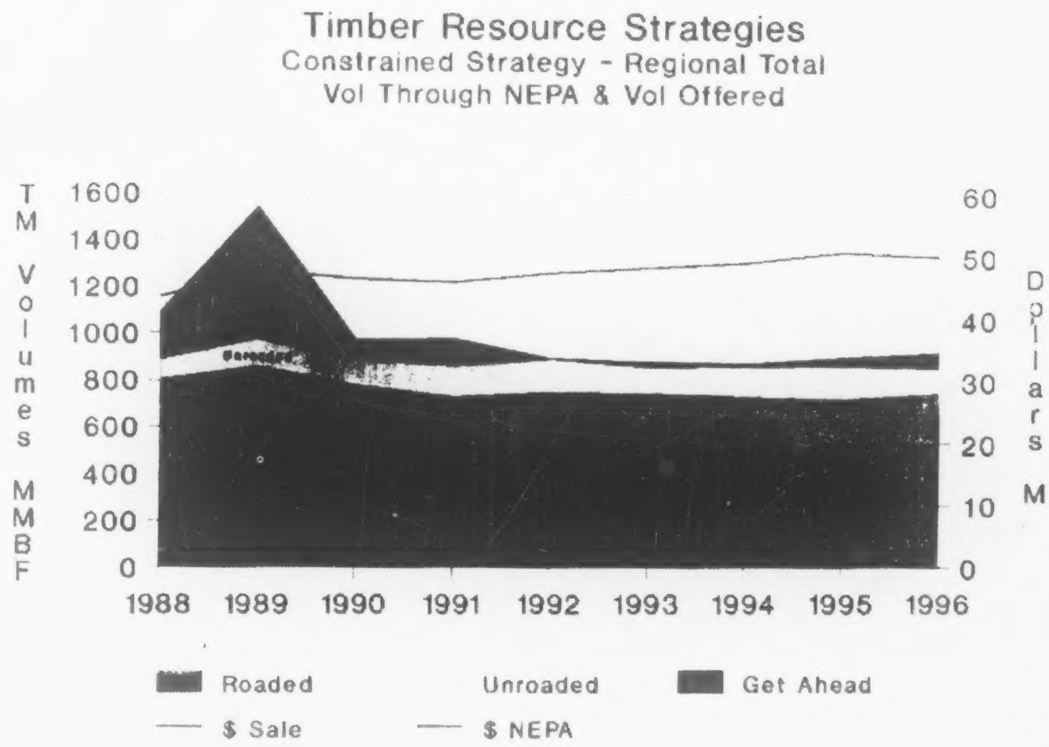
ISSUE: RESOURCE STRATEGIES

- Three strategies (alternatives) are presented by Region and State (Montana and Idaho).

1. Unconstrained Strategy
    - No dollar limitation.
    - NEPA compliance (Gate 2) 2 years ahead by the end of F.Y. 1992.
    - Maintain as high a sale volume as possible.

2. Constrained Strategy
    - Utilizes the current funding level (F.Y. 89).
    - NEPA compliance (Gate 2) 2 years ahead by the end of F.Y. 1992 if possible.
    - Maintain as high a sale volume as possible.

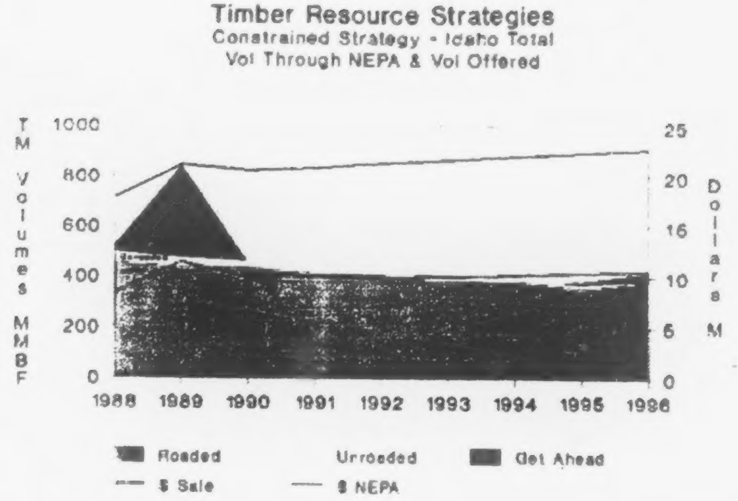
3. Westside Strategy
    - Unconstrained strategy on Idaho Forests (Idaho Panhandle, Clearwater, Nezperce) and Westside Montana Forests (Kootenai, Flathead, Lolo).
    - Constrained strategy on balance of Montana Forests (Beaverhead, Bitterroot, Custer, Deerlodge, Gallatin, Helena, Lewis & Clark).



Summary of sale prep through NEPA Gate 2, volume offered from roaded and unroaded and costs.

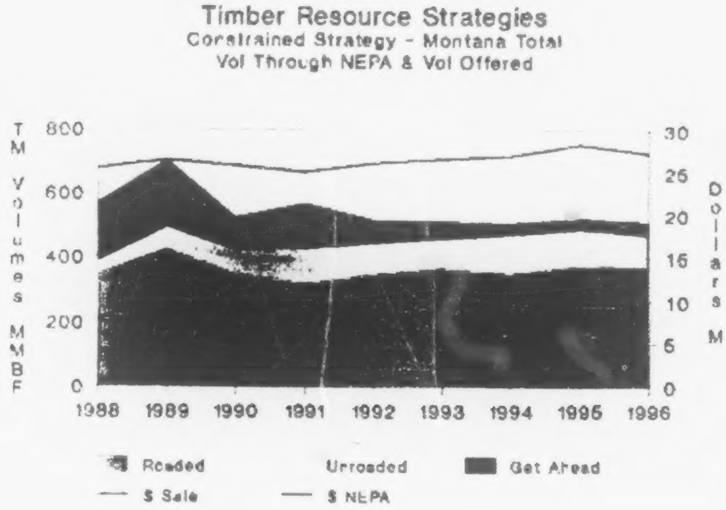
Timber Resource Strategies
Constrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,423	184	164	20	183
MT	12,190	184	164	20	183
ID	232	0	0	0	0
1988 R-1	43,289	888	802	86	1,094
MT	25,478	387	348	39	570
ID	17,811	501	454	47	524
1989 R-1	47,608	974	856	118	1,546
MT	26,446	496	424	72	706
ID	21,162	478	432	46	840
1990 R-1	46,317	886	780	106	976
MT	25,773	423	349	74	523
ID	20,543	463	431	32	453
1991 R-1	45,810	863	729	134	981
MT	25,020	425	318	107	568
ID	20,790	438	411	27	413
1992 R-1	47,293	889	749	140	898
MT	26,019	445	345	100	515
ID	21,275	444	404	40	383
1993 R-1	48,281	857	746	111	883
MT	26,534	457	365	92	510
ID	21,617	400	381	19	373
1994 R-1	48,951	861	732	130	878
MT	26,932	469	349	121	505
ID	22,019	392	383	9	373
1995 R-1	50,661	864	725	139	904
MT	28,253	489	372	117	521
ID	22,408	375	353	22	383
1996 R-1	50,032	858	750	108	927
MT	27,280	469	370	99	510
ID	22,752	389	380	9	417
1997 R-1	40,379	758	706	52	784
MT	17,451	349	310	39	377
ID	22,928	409	396	13	407



Timber Resource Strategies
Constrained Strategy - Idaho Total
Vol Through NEPA & Vol Offered

Summary of sale prep through NEPA Gate 2, volume offered from roaded and unroaded and costs.



Timber Resource Strategies
Constrained Strategy - Montana Total
Vol Through NEPA & Vol Offered

Summary of sale prep through NEPA Gate 2, volume offered from roaded and unroaded and costs.

Timber Resource Strategies

Constrained

	Sale Strategy				NEPA Strategy
	M Dollars	Total Volume (MMBF)	Roaded Volume (MMBF)	Unroaded Volume (MMBF)	Total Volume (MMBF)
1987 R-1	12,423	184	164	20	183
MT	12,190	184	164	20	183
ID	232	0	0	0	0
1988 R-1	43,289	888	802	86	1,094
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MT	27,280	469	370	99	510
ID	22,752	389	380	9	417
1997 R-1	40,379	758	706	52	784
MT	17,451	349	310	39	377
ID	22,928	409	396	13	407

REGION ONE

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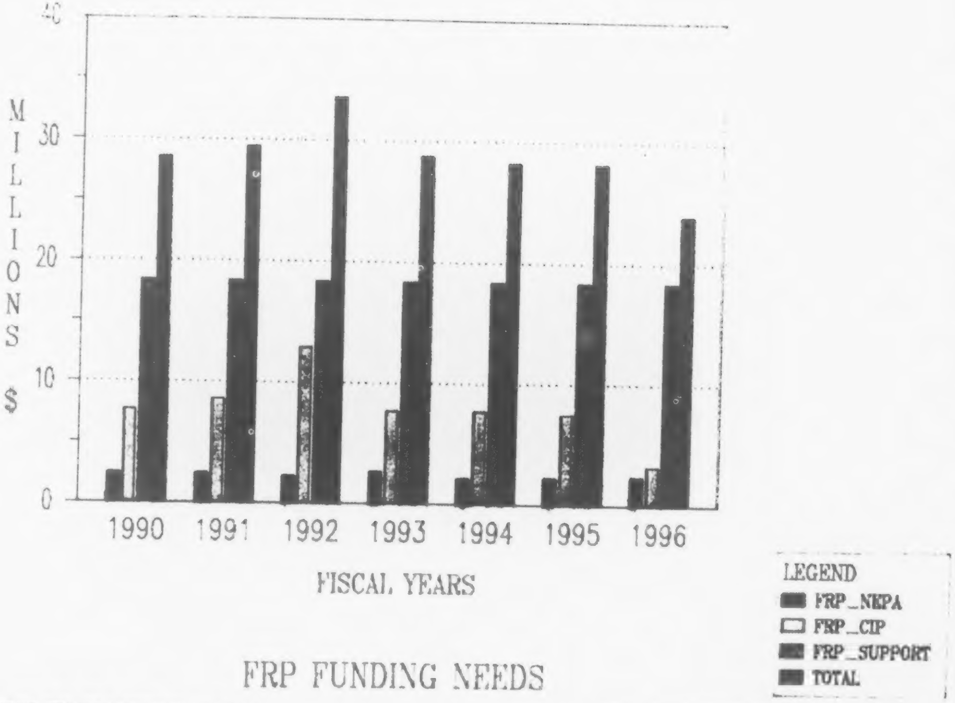

FRP FUNDING NEEDS

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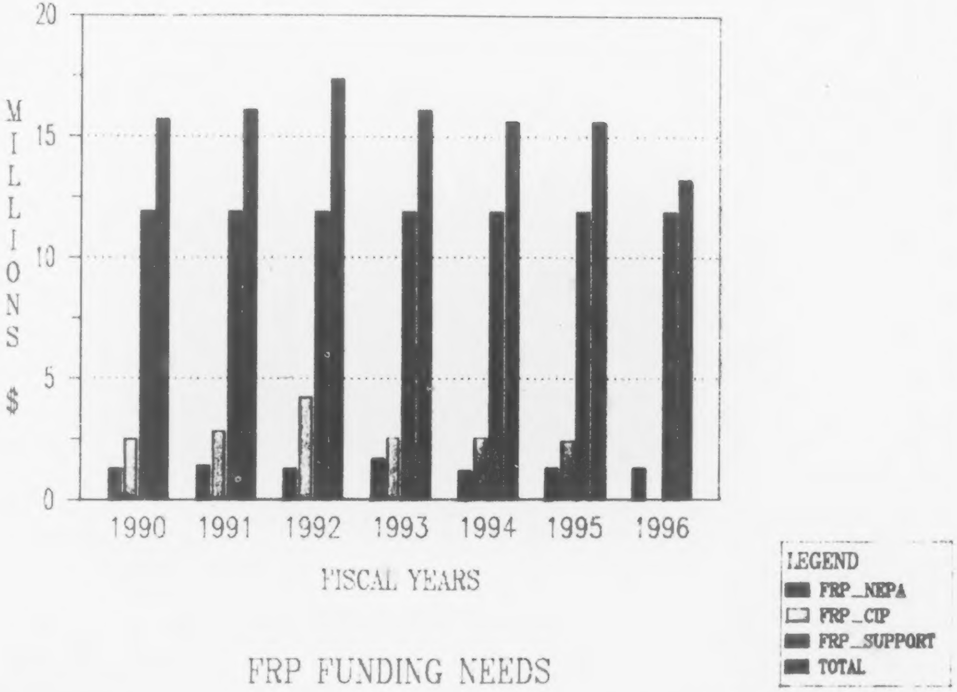

FRP FUNDING NEEDS

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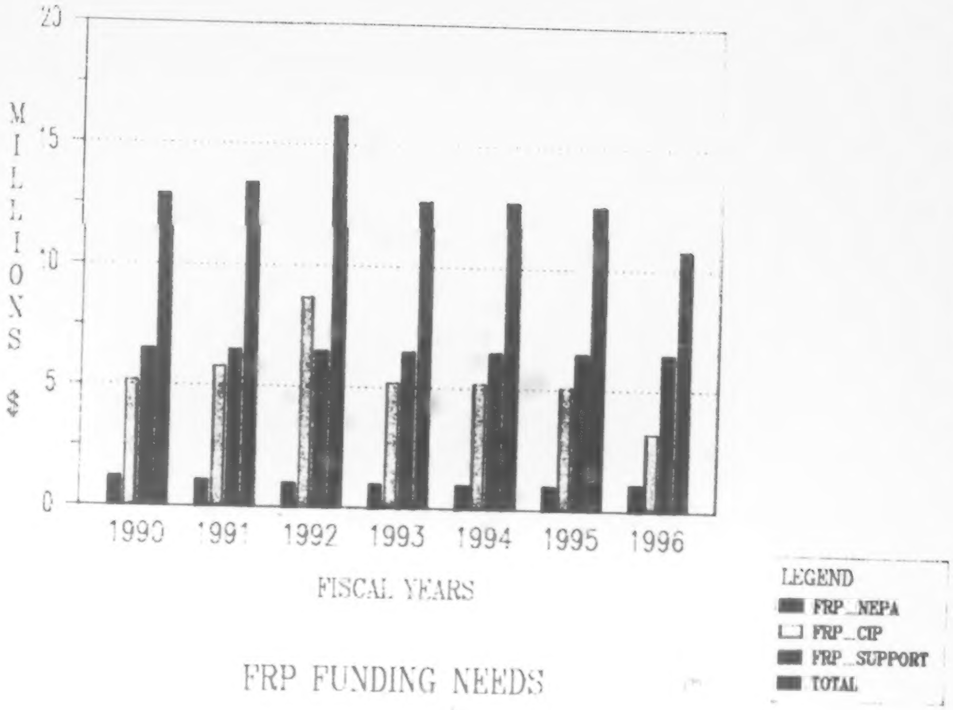


FRP FUNDING NEEDS

PREPARED STATEMENT OF JAMES S. RILEY, EXECUTIVE VICE PRESIDENT, INTERMOUNTAIN FOREST INDUSTRY ASSOCIATION, IDAHO FOREST INDUSTRY COUNCIL, COEUR D'ALENE, ID

I am James S. Riley, executive vice-president of the Intermountain Forest Industry Association (IFIA). The IFIA represents forest products companies in Montana and Idaho on matters relating to Federal timber sale programs. Our members depend extensively on the availability of timber from the National Forests to support their businesses.

APPEALS AND THE TIMBER SUPPLY CRISIS

The past 2 years has brought a growing timber supply crisis to western public lands States including Montana and Idaho. Disruptions to Forest Service timber programs have severely curtailed, and in some cases completely stopped, timber programs on several national forests. Consequently timber shortages have forced several sawmills in IFIA's operating area to close, either temporarily or permanently, caused forest industry workers to be laid off, and is resulting in socioeconomic hardship throughout forest industry communities.

Causes of the Federal timber program disruptions are varied and complex. However, in every case where timber program shortages are resulting in mill closures and associated impacts, the program reductions are *not* the result of a public policy decision. To the contrary, completed NFMA plans for national forests establish a policy of providing timber program levels necessary to support dependent industries and communities. It is now evident, however, that the Forest Service is unable to implement the public policy goals set by their planning process, which includes extensive public involvement.

As illustrated in Figure 1, the current Federal timber supply crisis in Montana has been developing since 1986. At this time the Forest Service began implementing new NFMA plans for Montana national forests. The new plans reduced timber programs by 67 MMBF, an 11 percent reduction from previous levels. Since 1986, the harvest of national forest timber has exceeded new sales levels each year, resulting in drastic declines in the inventory of uncut volume under contract. At the end of 1988 inventories of uncut volume under contract in Montana had dropped to a perilous low of only 19 months of annual harvest. Most disturbing is the startling observation that Forest Service timber programs for the past 3 years has fallen far short at the program levels established by the new NFMA plans. As illustrated in Figure 2, Forest Service Region One, which includes Montana and Idaho, has accomplished less than 75 percent of the annualized allowable sale quantities established by the Region's forest plans. The Regional averages mask the severity of timber program shortages on individual forests. The Beaverhead, Bitterroot, and Gallatin Forests show allowable sale quantity accomplishments of 39 percent, 37 percent, and 14 percent respectively. As a result, sawmill facilities in Dillon, Darby, and Livingston, Montana, all of which depend on the timber programs from these Forests, have recently been curtailed or closed because of timber shortages.

The inability of the Forest Service to deliver on the timber program obligations set in forest plans is a problem of serious proportions, and is caused primarily by the inability of the agency to resolve disputes over the content of NFMA plans and/or plan implementing actions. The inability to bring disputes to a final resolution, and thereby confirm action, is commonly referred to as the "appeals problem", and is the focus of this hearing.

THE APPEALS PROBLEM

Administrative appeals and litigation blocking implementation of Forest Service planning actions has grown at alarming rates during the last 3 years. In 1988 appeals and litigation delayed more than 133 MMBF of timber sales in Region One which would otherwise have been advertised. Although there may be some disagreement over the exact extent and impact of the appeals problem, there is no denying that the inability of the Federal Government to bring the dispute resolution process to conclusion is currently causing substantial hardship to sawmill workers and related businesses in Montana and Idaho communities.

In IFIA's view the proliferation of appeals and litigation, and the consequent disruption of planned timber sale programs, is clear evidence of a breakdown in the public policymaking process for Forest Service lands. The "appeals problem" is a symptom of a larger and more significant problem with the Forest Service's planning and decisionmaking process. However, it is absolutely essential to remedy the "appeals problem" as a first step in bringing order and stability to vital Federal land programs in the States I represent.

The "appeals problem" is caused because the existing procedures are biased in favor of obstruction and endless delay. The process serves those who's interests are to obstruct activities to implement the Forest Plan quite well, but offers little to those who's interests depend on the Forest Service fully implementing management decisions.

APPEALS SYSTEM

The problems with the previous appeals system have been well documented in industry testimony before this committee, hearings by the United States House of Representatives, and in the administrative record. In February 1989, the Forest Service implemented revisions to their appeals procedures in an effort to streamline the process so decisions could be reached in a more timely manner. The revised procedures are a significant step in the right direction but, in our view, stop far short at establishing the changes necessary to resolve current problems. No changes were made to limit the ability to use administrative appeals as a mechanism to cause delay. Further, no provisions were included to *require* a timely decision if the dispute was delaying actions essential to other interests. Most importantly, the Forest Service declined to include procedures to allow interests depending on the timely execution of Forest Service programs an equal opportunity to argue in favor of moving a decision forward during the review period. Our detailed review of the revised regulations has been submitted separately to the subcommittee as part of this hearing record.

LITIGATION—PART OF THE SAME PROBLEM

As we have struggled to resolve the appeals problem in Intermountain States, it has become increasingly evident that the appeals problem often matures into a litigation problem. Administrative appeals are a necessary prerequisite to filing litigation in Federal Court. We are now finding that, even after the laborious appeals process is complete, the appellants often follow an appeal decision with litigation to further block implementation of the Forest Service management policy. Active litigation on the Kootenai and Flathead forest plans, coupled with litigation following appeal decisions affirming several timber sales elsewhere in Montana, are an extension of the same problem. Through litigation, the management programs required to implement forest plans are vulnerable and often enjoined while the dispute is under review. With carefully crafted arguments it can take several years to fully process an appeal followed by litigation. As a result, the public policy objectives established by the plan became moot by delay.

THE SOLUTION

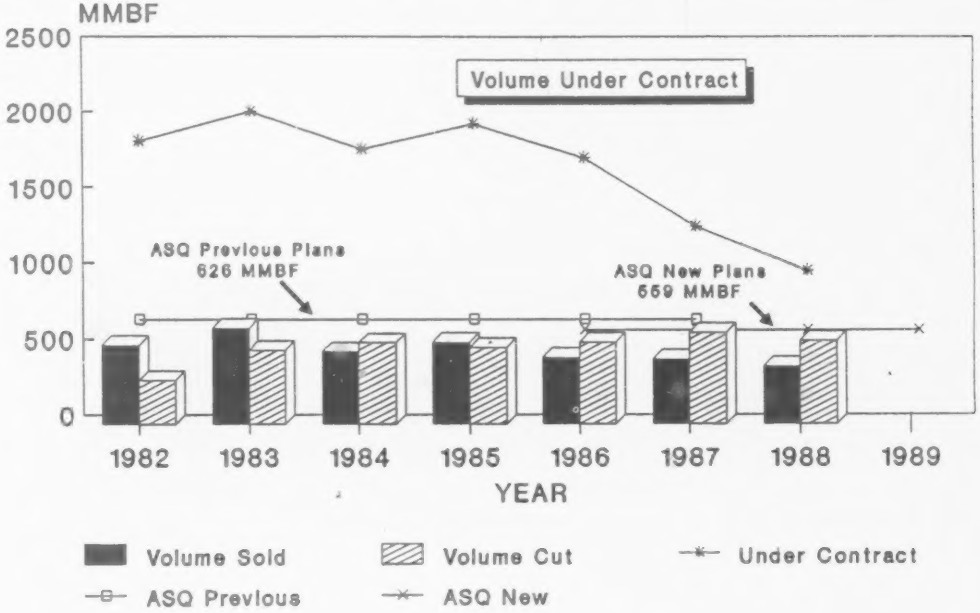
We welcome this Committee's attention to the public land policy crisis which is substantially impacting many small communities in the West. In our view, it will require congressional intervention to correct the breakdown of the process, and to restore order and fairness to agency decisionmaking and Federal land management planning. Congress certainly intended, when they enacted the National Forest Management Act of 1976, for the plans developed attendant to this Act to be implemented. That is not occurring. Further, Congress should be rightfully involved in correcting a dispute resolution process which alters public policy decisions through delay rather than as a result of an orderly process which moves to closure on a timely basis.

It is time, in our view, for Congress to resolve this matter by ratifying the public policy decisions reached in the final forest plans, and then by establishing an orderly dispute process which allows fair and timely review of forest plan implementation decisions to ensure they conform to policy objectives set by the plans.

Congress must act quickly, however, if there is interest in solving this problem in advance of widespread hardship in Western States.

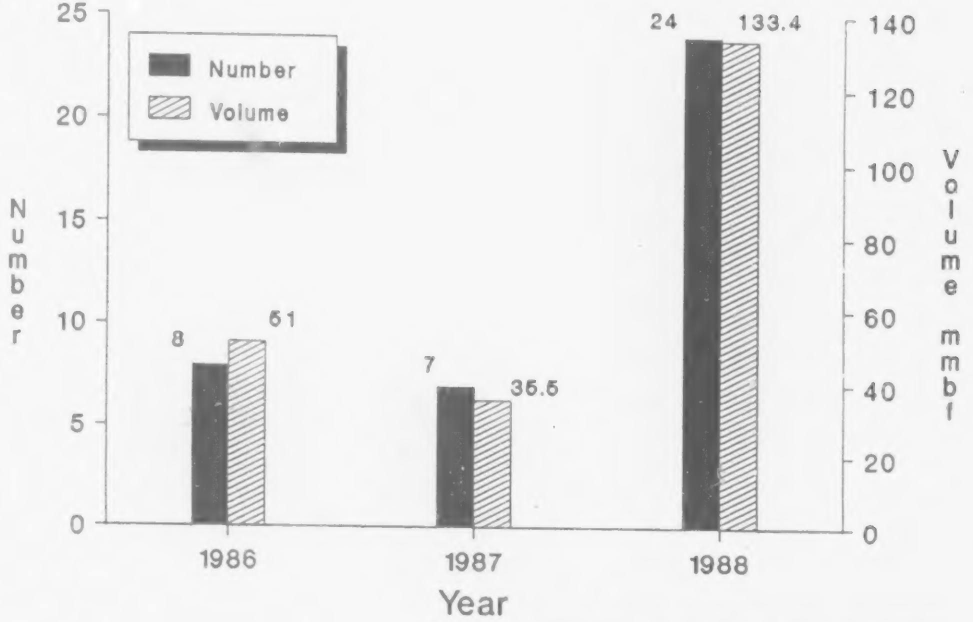
[Figures 1 and 2 and Summary of Region 1 ASQ Accomplishment, letter dated June 2, 1989, further comments on the Forest Service's new appeals rules with attachments follow:]

FOREST SERVICE TIMBER PROGRAM
MONTANA



R-1 Timber Sale Appeals

Number and Volume of Timber Sales Stayed



SOURCE: Forest Service Appeals Report 9/26/1988
INTERMOUNTAIN FOREST INDUSTRY ASSOCIATION

SUMMARY OF REGION ONE ASQ ACCOMPLISHMENT

FOREST	FOREST PLAN APPROVED DATE (1)	YEARS SINCE PLAN APPROVAL (2)	AVERAGE ANNUAL ASQ (MMBF) (3)	TOTAL ASQ SINCE APPROVAL OF PLAN (4)=(2)*(3)	VOLUME SOLD SINCE APPROVAL OF PLAN (MMBF) (5)	% OF ASQ ACOMPLISHED (6)	ACCUMULATED ASQ DEFICIT (MMBF) (7)=(4)-(5)
BEAVERHEAD	4/9/86	2	17.3	34.6	13.5	39%	21.1
BITTERROOT	9/30/87	1	33.4	33.4	12.5	37%	20.9
IPNF's	9/17/87	1	280.0	280.0	241.5	86%	38.5
CLEARWATER	9/23/87	1	173.3	173.3	117.2	68%	56.1
CUSTER	6/10/87	1	3.5	3.5	5.4	154%	(1.9)
DEERLODGE	9/23/87	1	23.0	23.0	19.5	84%	3.5
FLATHEAD	1/22/86	3	100.0	300.0	200.4	67%	99.6
GALLATIN	9/23/87	1	21.0	21.0	3.0	14%	18.0
HELENA	5/28/86	2	15.0	30.0	24.2	81%	5.8
KOOTENAI	9/14/87	1	227.0	227.0	178.9	79%	48.1
LEWIS & CLARK	6/4/86	2	12.1	24.2	16.7	69%	7.5
LOLO	4/8/86	2	107.0	214.0	135.8	63%	78.2
NEZ PERCE	10/8/87	1	108.0	108.0	93.6	87%	14.4
REGIONAL TOTAL			1120.6	1472.0	1062.2	72%	409.8

National Forest Products Association,
Washington, DC, June 2, 1989.

The Honorable Wyche Fowler,
U.S. Senate, Senate Russell Building, Washington, DC.

Dear Mr. Chairman: The National Forest Products Association would like to thank you for holding the hearing on May 18 to address appeals of Forest Service decisions. This issue is of great importance to the forest products industry, especially in States like Montana, Texas, and the west coast where appeals are causing significant delays in the sale of Forest Service timber and have consequently created a timber supply crisis.

Jim Riley of the Intermountain Forest Industry Association testified at the hearing that he would submit for the record further comments on the Forest Service's new appeals rules. On Mr. Riley's behalf, I submit the following critique of the Agency's recent revision to the administrative appeal regulations for the hearing record.

The National Forest Products Association's critique points out that, while the new rules are an improvement over the previous rules codified at 36 CFR § 211.18, there is still room for further improvement to the appeal process. The most significant change in the rules is the provision to limit most appeals to one level of requested review. This limitation retains the right for parties to appeal many Agency decisions, yet it provides more reasonable limits to the total time required for the review.

By contrast, the new rules still provide unilateral authority for reviewing officers to extend time limits for reaching decisions. The rules do not provide shorter time periods for the filing of appeals—in fact, the filing period was extended for appeals of forest plan decisions. Neither did the Agency adopt provisions for a filing fee or bond requirement for appeals or stay requests.

While we are disappointed that the Forest Service did not incorporate more extensive changes in the new appeal rules, we would emphasize that the Forest Service must now move to ensure that the new rules are implemented. The Agency and others should carefully monitor the Forest Service's progress in implementing the rules to assure that: (1) new appeals are dismissed when incomplete or inaccurate documents are filed; (2) deadlines for all parties are strictly adhered to; and (3) time period extensions are allowed only in accord with the provisions of the regulations.

It is equally important that the Agency make every effort to process and resolve in a timely manner appeals pending under the previous rules codified at 36 CFR § 211.18. In addition, we would urge the Forest Service to identify and report the Agency's costs associated with appeals—both under the old rules, for appeals still pending, and for new appeals filed pursuant to 36 CFR § 217 or § 251.

The cost of answering and processing administrative appeals has never been explicitly detailed by the Forest Service. The Agency's TSPIRS timber program accounting system could, with modifications, provide this information on an annual basis for timber sale appeals. NFPA has and continues to urge the Agency to refine TSPIRS and explicitly report these costs. We would welcome your support in this effort.

A more detailed critique of the rules for appeal of Forest Service planning and project decisions (codified at 36 CFR § 217) is attached. In addition, NFPA's comments to the Forest Service on the proposed rule changes published in the May 16, 1988 *Federal Register* are enclosed. Thank you for the opportunity to include these comments in the hearing record.

Very truly yours,

Anne E. Heissenbuttel,
Manager, Federal Forest Planning.

Enclosure.

CRITIQUE OF THE NEW RULES FOR APPEAL OF FOREST SERVICE DECISIONS

36 CFR § 217

I. Background

The Forest Service has issued new rules for the administrative appeal of Agency decisions which take effect February 22. Appeals filed prior to February 22 will continue to be governed by the current rules at 36 CFR § 211.18 (or, for salvage appeals, at 36 CFR § 211.16). As proposed by the Agency last year, the new rules provide separate procedures for: (1) decisions on use and occupancy permits, at 36 CFR § 251; and (2) decisions on land and resource management plans and projects, at 36 CFR § 217.

The following improvements to the appeals process are included in the rule package: (1) only one level of requested review is allowed for most decisions; (2) extensions for filing the statement of reasons are no longer allowed; (3) discretionary second level reviews are limited to 30 days; (4) stay requests must be decided within 10 days; (5) stays are not automatically granted when projects are scheduled to begin during the life of the appeal; and (6) intervention rights have been retained.

While some provisions of the new rule are more clearly explained than in the proposed rule published last May, the new rule does include language that will require further clarification. The Forest Service intends to develop further guidance to be published in the Forest Service Manual and Handbook.

II. SIGNIFICANT PROBLEMS IN THE APPEAL PROCESS REMAIN UNRESOLVED

The new appeal rules respond in part to industry comments, but also, in part, to environmental group pressure.

A. THE NEW RULES ARE ONLY A MODEST STEP IN THE RIGHT DIRECTION

The effectiveness of the new rules will hinge to a large degree on the ability of the Forest Service to make appealable decisions well in advance of the time scheduled for project implementation. Until this can be done, delays in processing appeals may still be a significant factor in causing delays in the timber sale program.

The new rules, while limiting most appeals to only one level of requested review, still provide unilateral authority for Reviewing Officers to extend time limits for reaching decisions. In addition, the Agency did not reduce the amount of time provided for filing an appeal as the industry requested—in fact, the filing time for forest plan appeals has been doubled to 90 days.

B. THE ONLY MAJOR CHANGE FROM THE CURRENT RULES IS THE ELIMINATION OF AN AUTOMATIC SECOND LEVEL OF REQUESTED REVIEW

If the Forest Service hoped to make any progress in: (1) reducing the time required to reach appeal decisions, and (2) moving forward with planned programs (or improving decisions which were successfully appealed), then the Agency had little choice but to eliminate the second level of automatic review.

C. THE AGENCY STILL CONSIDERS THE ADMINISTRATIVE APPEAL PROCESS TO BE AN EXTENSION OF THE PUBLIC COMMENT PERIOD

In its January 19 "Statement and Contents Summary" on the revised appeal rules, the Forest Service said, "[t]his regulation affords an appellant another opportunity, in addition to their previous involvements in the planning process, to contribute information about agency decisions." NFPA strongly disagrees that the appeal process should be considered an extension of the public involvement process.

The appeals process should provide a means for members of the public to resolve disputes relating to Forest Service decisions. To accomplish this, the Agency should have more narrowly drawn the requirements for filing an appeal.

D. THE AGENCY'S REJECTION OF A REQUIRED FILING FEE WILL DO LITTLE TO REDUCE THE NUMBER OF REPETITIVE APPEALS

Adoption of NFPA's recommendation for a modest filing fee would have helped defray the substantial costs incurred by the Agency in processing appeals. In addition, a modest fee would discourage the filing of repetitive or duplicative appeals, while still providing a process for the public to appeal Agency decisions.

III. THE FOREST SERVICE SHOULD ISOLATE THE AGENCY COSTS ASSOCIATED WITH APPEALS THROUGH MODIFICATIONS OF THE TIMBER SALE PROGRAM INFORMATION REPORTING SYSTEM

While the Forest Service has attempted to identify its costs associated with appeals over the past few years, the costs have been—by the Agency's own admission—estimates. The Timber Sale Information Reporting System (TSPIRS) now in place does not provide the ability to explicitly document either timber sale appeals processing or timber sale litigation costs. The Agency should begin to identify and track these costs and display them as a line item in the TSPIRS reports for each forest, region, and the Washington office.

NFPA

BARRY M. CULLEN
PRESIDENT
202-463-2710

July 15, 1988

Mr. F. Dale Robertson
Chief
U. S. Forest Service
Department of Agriculture
Box 96090
Washington, DC 20090-6090

Dear Chief Robertson:

Enclosed are the comments of the National Forest Products Association (NFPA) on the Forest Service's May 16, 1988 proposed regulations to revise the Agency's administrative appeals process governed by regulations presently found at 36 § CFR 211.18 (53 Fed Req. 17310). NFPA offers the enclosed comments on behalf of its member companies and associations, several of which purchase timber from the national forests, and have been involved in appeals of Forest Service decisions. The enclosed comments reflect several years of experience on the part of NFPA and its members with the current appeals regulations.

NFPA commends the Forest Service for responding to the widespread frustration with the present appeals process, and undertaking this review of the appeals regulations. We particularly commend the Agency staff that have spent considerable time and effort in order to move the rulemaking to the proposed stage for public comment. The proposed rules generally represent a positive first step toward a more efficient appeals process.

While a positive first step, the proposed rules are only a modest improvement in many respects, and are problematic in still others. Enclosed, we offer a number of specific recommendations to improve the proposal as it moves forward to a final rule. The unifying principle underlying all of our recommendations is that they point toward a fair and equitable, but expeditious, review process that frames issues for either a negotiated resolution or a final Agency decision, and (where appropriate) sets the basis for judicial review based upon a well-drawn Agency record.

NATIONAL FOREST PRODUCTS ASSOCIATION
1250 CONNECTICUT AVE NW • SUITE 200 • WASHINGTON, DC 20036

Our enclosed recommendations touch upon almost all areas of the proposal. However, there are three areas of concern in particular that we would like to highlight for your attention.

First, NFPA strongly objects to the elimination of intervenor status in the proposed rules. As we indicate in the enclosed comments, we believe that this change will increase both the number of appeals and the complexity of the appeals process, rather than have the reverse result. Moreover, this change raises basic questions about the fairness of the proposed rules. In a review of the public comments received by the Agency through July 13, we noted that 100% of the comments that addressed this issue opposed its implementation in the final rule.

We have discussed with Agency staff the problems that intervenors have created under the current rules. Our proposed changes to the intervenor status, requirements, and responsibilities, in our view, fairly respond to the Forest Service's concerns while still maintaining the opportunity to intervene in administrative appeals.

Second, in several areas we recommend tighter time frames for action and strict adherence to deadlines by all parties, including the Forest Service. One test of a fair and efficient appeals process is whether the passage of time is, to the maximum extent possible, a neutral factor in the process. Unfortunately, the current appeals rules fail this test. Nor is it clear that the proposed rules would greatly improve the situation.

We recommend a number of deadlines that are tight, but we believe fair and ultimately designed to move all parties to a final decision and on to the next stage of review in District Court if that is appropriate and desired. Long delays should be suffered only when parties in an appeal are making genuine progress toward a negotiated resolution -- not as a matter of habit, due course, or ultimately as a means of determining the outcome on the merits.

Third, NFPA strongly encourages the Forest to use this revision to the appeals rules as an opportunity to better integrate the appeals process with other Agency management and public participation functions. Specifically, we recommend that the Forest Service narrow the scope of appeals review for an activity carried out under the authority of a final forest plan with all appeals resolved, to an assessment of whether the activity is in compliance with the plan. We provide our detailed rationale for this change in the enclosed comments. In sum, this modification will not only reduce the complexity of the appeals process, it will also highlight the role of the forest plans in the Agency's management system.

We appreciate the opportunity to offer our views. In developing the enclosed comments, we acknowledge that it is easier to criticize that to create. My staff and I would like to meet with you at your earliest convenience to discuss these comments. Please do not hesitate to contact us if you need additional information, or have any questions on the above or enclosed materials.

Sincerely,

Barry M Cullen

Barry M. Cullen

Enclosures

July 14, 1988

Comments of the National Forest Products Association on the Proposed Rules for Appeal of Decisions Concerning the National Forest System

I. INTRODUCTION

The U.S. Forest Service published a proposed rule in the May 16, 1988 Federal Register which would replace the current administrative appeal regulations at 36 CFR § 211.18 with two new and separate sets of regulations. The Agency developed the proposed rule following an internal review of the existing appeals process for decisions related to the management of the National Forest System.

On September 8, 1987 the National Forest Products Association submitted comments to the Agency which reflected our experience and frustration with the present rules, and our evaluation of how the process could be improved to serve the Forest Service and the public. Many of these comments are applicable to issues raised in the proposed rule. Therefore, they are attached for consideration as the Agency develops final regulations. In further response to the Agency's request for comments on the proposed rule, NFPA submits the following remarks.

We commend the Forest Service for proposing steps "to streamline, simplify and expedite the appeals process and to eliminate the longstanding confusion of purpose and procedures contained in the current appeal regulation." (53 Fed. Reg. 17310). We believe some of the measures proposed in Sections 217 and 251 will help achieve this objective, but also feel that further steps must be taken.

In our attached September 8, 1987 letter, NFPA recommended that the appeals process be divided into two separate procedures. Unlike the Agency's current proposal, we suggested that appeals for project level decisions be separated from the more complex national forest plan appeals. We continue to support the concept of a Board of Forest Plan Appeals. However, we believe that the proposal to limit appeals and requests for review to one level of review as proposed in 36 CFR § 217 may, in practice, at least separate the majority of project reviews from plan reviews, and serve to reduce the work load on any one office within the Agency. For this and other reasons more fully developed below, we support this restriction to one level of review as a step in the right direction.

By contrast, other proposals contained in the draft rule are not so well conceived. The provision to drop intervenor status from the process, for example, is completely unacceptable, as well as unnecessary. We agree with the Agency's concern that intervenors not be allowed to extend the time required for completion of an appeal. However, we propose a less draconian approach to dealing with this problem which would allow intervenors standing, while providing that they meet all deadlines established within the rules for other parties.

These and other recommendations for changes in the rules are detailed below. However, before describing the specific changes we recommend, we will first discuss some underlying assumptions that must be clearly understood in evaluating both the need for changes to the Forest Service appeals process, as well as our specific recommendation for such changes. In some cases, NFPA and the Forest Service do not share these assumptions, and that is the reason for our proposed changes.

II. The Evolving Complexity of Issues, Not Procedures, Has Caused the Need for Changes in the Appeals Process.

The Forest Service has somehow convinced itself that "the evolution of complex procedures "has emerged as the primary culprit in the longer time frames currently required to complete an appeal. This is not true -- the procedures outlined in 36 CFR § 211.18 have not materially changed over the last few years. We believe the problem more accurately lies in the increasing complexity of issues raised, and the shear length and number of documents submitted by all parties in the course of appeal resolution. Certainly, the simple increase in the number of appeals has also contributed to current delays.

This is more than a semantical difference because it is an incorrect assumption which underlies some of the ill-considered elements of the proposed rule. In setting out to strip the "complex procedures" out of the current regulations, the Forest Service has eliminated some elements of the Section 211.18 regulations that are not presently serving a useful purpose. Some examples are provided immediately below.

At the same time, by fixating on undesirable procedures -- rather than at least acknowledging the impact of new, and more complex issues -- the Forest Service has eliminated some of the procedural elements that must be contained in any sort of decision review process, no matter how informal, as a matter of simple fairness. NFPA urges the Forest Service to overcome this problem of cognitive dissonance as it works to finalize the proposed rules. In several instances, we make recommendations designed to retain basic due process and equity in the new rules.

NFPA supports the Agency's efforts to reduce the time involved in processing appeals. As indicated above, we believe that the elimination of: (1) the Reply to the Responsive Statement; (2) the currently structured, formal oral presentation; and (3) the second level of appeal, are all measures which will serve this purpose well. With these changes, the Agency will still retain the necessary flexibility to respond to the more complex issues of today's appeals, and provide for the more prompt issuance of final decisions.

III. The Forest Service Must Show its Commitment to Getting the Job Done and Minimizing Bias in the Review and Decision-making Process.

The Forest Service recognizes under "Finding 7" that "by virtue of its being an internal review process, some citizens will always perceive bias and will further infer bias from appeal decision history." (53 Fed. Reg. 17313). In light of this finding, the Agency must clearly show its commitment to minimizing the possibility for bias by providing explicit policy that individuals involved in the development of any decision are expressly prohibited from participating in a review of that decision.

The Agency must further demonstrate its commitment to processing appeals under the tighter timeframe provided in the proposed rules by addressing its staffing needs in conjunction with the adoption of these rules, and not as a function of after-the-fact monitoring. We address the issue of staffing needs further in our line-by-line comments on proposed Section 217.10.

In addition to basic staffing needs, the Agency must also commit to whatever changes in its current organizational structure are necessary to ensure timeliness and quality control in both appeals processing decisions, as well as the decisions on the merits. The Forest Service appears to be running a major appeals function (or functions) without an organized, or even clearly recognized, docket to monitor sequencing or time-frames in appeals decisions.

As a consequence, there is a new event virtually every week which calls into question whether anyone is in charge of overseeing how decisions are made and how long it takes to make them. For example, this week NFPA read in the newspaper that the Forest Service is contracting with the Keystone Institute, an environmental mediation firm, to mediate some 39 appeals on the final Flathead National Forest plan. Why this decision is being made now, some 2.3 years after the close of the appeal period and after extraordinary Agency resources have been consumed in filing multiple Responsive Statements, is unclear. What is clear is that, as an appellant, NFPA should not have to scan every newspaper to learn of the disposition of an appeal in which it already has a party interest.

The Agency's commitment to an efficient appeals process will, by necessity, have to extend beyond these regulations. NFPA urges the Forest Service to consider whatever internal organizational changes are necessary to assure that the decision-making process runs efficiently.

IV. The Forest Service Should Establish Procedures Which Provide A Narrower Scope of Review for Project-Level Decisions.

As we stated in our September 1987 comments, NFPA recommends that administrative appeals of projects carried out pursuant to a final NFMA plan with all appeals resolved should be limited to a review of whether the project complies with the requirements of the plan. Review of these decisions should not consider new issues of fact or law not raised in the comment period on, or appeal of, the forest plan -- except where the requester can show that changes in law or factual circumstance justify a broader scope of review.

The Forest Service's findings in the May 16 Federal Register provide a strong basis for this approach. In the supplementary information to the proposed rule, the Agency describes the evolution of the appeals process and the regulatory history of past decades. It recognizes that, following the passage of environmental statutes in the 1960's, the "National Forest Management Act in 1976 and implementation of its land management planning requirements have further increased public participation in agency decision-making and strengthened public awareness of the agency's activities." (53 Fed. Reg. 17311).

The Agency states further in "Finding 4" that "[d]ecisions that have been thoroughly analyzed, documented, and subjected to public participation under provisions of [statutes such as the

National Environmental Policy Act and National Forest Management Act] are habitually recycled through the appeals process, giving the public, as it were, redundant opportunities to object to a single decision." It clearly follows that planning decisions made with full public involvement -- including the resolution of plan appeals -- must now be held as the standard from which to measure the compliance and merits of subsequent decisions.

Moreover, the Forest Service is now at the point -- with the completion of final land and resource management plans -- that the question of plan implementation must be an important element in modifying the day-to-day management of a number of Agency programs and functions. The plans clearly provide a series of binding standards, guidelines, and constraints governing the management of the national forests. They have been developed in a fashion to assure consistency with a wide variety of environmental laws and policies applicable to the management of the national forests. Indeed, forest plan appeals currently underway challenge the Agency to demonstrate that the plans establish a program of broad environmental protection and resource management.

Once the forest plan appeals are resolved, it will not serve any useful purpose to revisit all of these issues in the context of subsequent appeals over activities undertaken in accordance with the plan. Inasmuch as the plans provide the guidelines which govern subsequent activities, they should also be used as the standard against which these activities are measured.

In our view, this approach provides two major advantages to the Forest Service in: (1) reducing the complexity of the issues raised in appeals; and (2) establishing the forest plans -- upon their completion -- as the basic management program for the national forests. The former is crucial to the improvement of the appeals process. The latter is more broadly essential to assure that the Forest Service receives some return on its extraordinary investment in the development of the first round of forest plans under the National Forest Management Act of 1976.

In our view, this is the most significant change to the appeals process that the Agency could presently adopt. We would be happy to discuss this and similar suggestions further if the Forest Service would find this helpful. Our attached September 1987 comments also provide additional analysis supporting this change.

NFPA recommends that, in addition to narrowing the scope of review for project decisions, review decisions be given precedential value to prevent the unnecessary and time-consuming, repeated review of issues previously decided. The current lack of precedence for decisions is a large factor in the existing problem of lengthy resolution of appeals. We provide specific language at Section 217.11(b)(7) designed to remedy this problem.

V. NFPA Offers Line-by-Line Changes to the Proposed Rule to Address Our Specific Concerns.

Attached to this statement is a copy of the proposed rule, 36 CFR § 217, with our line-by-line recommendations shown in strike-out or added type. Many of the changes in language are proposed by NFPA to improve the clarity of the rules. In addition, a number of substantive changes are also proposed. These are explained below.

1. Section 217.3. Definitions and Terminology: Decision Memo.

NFPA does not propose any specific changes to this portion of the rule at this time, inasmuch as the Agency notes that "[s]eparate notice on this new term and procedures governing preparation and giving notice of such decisions will be published in the Federal Register soon..." (53 Fed. Reg. 17319). However, until the forthcoming notice is published, the Agency should reserve this and any other portions of proposed Section 217 that pertain specifically to the Decision Memo. These sections should be again open for review and comment when the aforementioned Federal Register publication is issued.

The preparation of Decision Memos and the procedures for giving notice of such decisions are very important aspects of the entire review process. In particular, questions involving when a decision document is required, or what information must be included in that document are items of critical concern. NFPA looks forward to the opportunity to comment upon this separate notice as soon as possible.

2. Section 217.4. Eligible Participants.

NFPA believes that intervenor status is essential to ensuring the integrity and efficiency of the review process. The proposed rules' treatment of this issue is the single, most glaring deficiency in the proposal. It creates a fundamental inequity in procedure that transcends any particular interest group or segment of the public, and threatens to undermine the effort to reform the rule. This is clearly evidenced by the fact that, as of July 14, 100% of the comments received on the rule which discussed this issue -- from all segments of the public -- opposed elimination of intervenor status. In the often divisive area of national forest appeals, one unifying theme has clearly come to the forefront.

While the proposed rule does provide the opportunity for anyone to comment throughout the process, there is no provision for parties who may be affected by review decisions to have any formal standing in that review. Equal standing among parties is an essential prerequisite in any conflict resolution scheme. Without it, the basis for resolving a conflict in an equitable fashion to everyone's satisfaction simply does not exist as a matter of basic procedure.

Without intervention, parties adversely affected by the review process have no recourse other than to request review of any decisions modified or reissued as a result of a previous request for review to which they were not a party. This review, in turn, may result in requests for review by other parties in the event that the decision continues to change.

The language proposed by NFPA governing the conduct of parties granted intervenor status is designed to insure that: (1) all affected parties are eligible to participate in the review process; (2) intervenors are not allowed to delay the processing of a review decision; and (3) repetitive or duplicative intervention requests do not encumber or delay efficient administration of the appeals process. The limitations we propose are more fully described under our proposal for a new Section 217.[12] governing intervention.

Additionally, our proposed language under Section 217.4 would recognize the legal relationship between timber purchasers and the Agency, especially in cases where timber sales are auctioned prior to the completion of the appeals process. The Agency recognized the need to address situations involving written instruments by proposing separate regulations at Section 251 for the appeal of decisions affecting these parties. By contrast, the recognition of parties' direct interest in the case of an auctioned timber sale is conspicuously absent from Section 217. Granting purchasers or potential purchasers intervenor status will help to remedy this oversight. We have also submitted under separate cover very specific comments highlighting our problems in this area in NFPA's response to the Agency's interim rules on fire salvage appeals (53 Fed. Reg. 17029).

3. Section 217.6. Decisions Subject to Review.

The language in Section 217.6(a) which restricts reviews to only activities related to National Environmental Policy Act (NEPA) processes should be modified and expanded. Several types of Agency decisions which are currently appealable should not be excluded from the review process. For example, NEPA considerations are not generally involved (nor should they necessarily be) in decisions to implement: (1) scaling rules or guidelines; (2) changes in log accountability rules; or (3) guidelines and changes in fire precaution rules and standards. Yet, these decisions currently are -- and should continue to be -- appealable under these rules.

Such actions involve instances in which the Agency decision-makers exercise judgement and should, thus, not be insulated from public scrutiny through the appeals process. Moreover, such decisions often involve significant financial or resource issues whose resolution is better found within the procedures provided by an organized review process. The protection provided by a review record will be beneficial to both the Agency and potential requestors.

These activities may have far-reaching effects upon industry and dependent communities. Therefore, they should continue to be subject to review to the same extent as NEPA-related decisions. In fact, since these types of actions are not bound by the due process protection included in NEPA, a reasonable case can be made that the use of the appeals process is even more important in such circumstances.

Decisions such as those described above should be reviewable pursuant to Section 217.6. Therefore, NFPA proposes additional language under Section 217.6[b] to address this concern.

In addition, we believe, as indicated above, that for projects governed by a national forest plan, the scope of review should be more narrowly drawn. Only those project decisions that do not comply with a previously issued final forest plan should be subject to review. We have thus added language under Section 217.6(a) that clearly states the restriction that project-level decisions should be limited to review of their compliance with the requirements of the forest plan.

4. Section 217.7. Decisions Not Subject to Review.

As stated in our comments submitted July 12, 1988 regarding interim rule 36 CFR § 211.16, NFPA supports the separate treatment of decisions related to rehabilitation and recovery of forest resources following natural disasters. The need for prompt action to: (1) rehabilitate watersheds following wildfires; or (2) restrict the rapid spread of insects or disease, for example, fully justifies -- even requires -- the use of an expedited process for appeals of such decisions. Therefore, we strongly encourage the retention of paragraph 217.7 (a)(11) in the final rulemaking.

Paragraph (a)(12) of this Section excludes decisions embodied in policies and procedures. For the purposes of consistency with Section 217.6, this language should be deleted.

Paragraph (a)(14) of this Section permits parties that are eligible to appeal under Section 251 to elect instead to request review under Section 217. NFPA disagrees that it is reasonable to allow a choice between appeals procedures. We recommend, instead, that decisions appealable under Section 251 be completely excluded from review under Section 217. This distinction is necessary for the efficient processing of appeals, and responds to public requests to clearly identify what type of decisions are appealable under the rules. Language in Section 251 should be changed accordingly to reflect this distinction.

NFPA concurs with the language in Section 217.7(b) which provides for the dismissal of requests to review actions which merely implement decisions previously subject to review. This language is necessary to allow the Agency to implement decisions which have already been approved and is consistent with current procedures.

5. Section 217.8. Levels of Review Available.

The provision to limit requests of review to one level is the single, most effective step taken in this proposal to streamline and expedite the appeals process, while continuing to provide for the proper review of decisions. The Agency must show a commitment to use the discretionary second level of review in a very discriminating manner.

Because most project decisions are made at the district or forest level, and land management planning decisions are made at the regional level, the limitation to one level of review should effectively separate the review of planning and project decisions. This separation should help to: (1) alleviate the backlog of appeal decisions at each office; and (2) aid in the efficient processing of reviews.

6. Section 217.9. Filing Procedures and Timeliness.

NFPA proposes that the time for filing requests for review be reduced from 45 to 30 days. The vast majority of requests for review will involve issues likely to be followed closely by interested parties and subject to public comment and/or public hearings prior to publication of the notice of decision. Accordingly, 30 days is more than sufficient time within which to require the filing of any requests for review. Shortening this initial time period will have little or no adverse impact on potential requesters. It is also consistent with the Forest Service's objective of reducing, as much as possible, the time required for the review process. NFPA believes that firm deadlines of the shortest reasonable duration for both the public and the Forest Service will significantly improve the efficiency of the review process to the benefit of all concerned.

In addition, where a request for review is filed for a timber sale already offered for bid, we suggest the addition of provisions to provide for the timely notification of all bidders and, in particular, the awardee. Such notice appropriately recognizes the business relationship between bidders and the Forest Service, and provides bidders the timely opportunity to comment or intervene in the review as necessary.

Finally, NFPA proposes a modest filing fee of $250 to help defray the substantial costs incurred by the Agency in processing requests for review, and to discourage repetitive or duplicative requests. The rationale for this recommendation is provided in greater detail in the attached comments on the specific elements of the proposed rules.

7. Section 217.10. Extensions of Time.

NFPA urges the Forest Service to strictly enforce all deadlines involved in the review process. All parties, including the Forest Service, should be required to meet the time periods specified in the rules. We note that the Agency recognizes that, under the current rules "[s]eldom, however, are appeals completed within [the] timelines" (53 Fed. Reg. 17311), and "that [the Agency] must improve its internal management of the process itself." (53 Fed. Reg. 17315).

However, the Forest Service falls short in its commitment to improve by proposing only that "special emphasis will be given to monitoring how well Deciding Officers and Reviewing Officers meet deadlines under the new rules, and prompt action will be taken to remedy excessive delays in Forest Service processing of appeals" (emphasis added). It is our firm belief that the Forest Service cannot stand by and merely "monitor" its ability to meet deadlines under the new rules. Rather, the Agency must recognize the immediate need for staffing adjustments. The backlog of appeals already under review is compelling evidence that there is a need for additional staffing to process the existing, as well as new, appeals and requests for review under the proposed rules.

NFPA recommends that the language at Section 217.10(b) which generally allows extensions of deadlines by unilateral authority of the Reviewing Officer should be replaced with new language more narrowly defining the Reviewing Officer's responsibility. We propose that, for extensions beyond a total of 20 days, the consent of all parties to the review must be required. This limitation would provide for extensions where all parties are participating in good faith negotiations.

We further propose that, for decisions where more than one request for review is received, the Reviewing Officer may extend the deadline for the transmittal of documents by the Deciding

Officer so that all similar requests may be carried forward on the same timeline.

Finally, we recommend that, when a delay of implementation is granted during a review, further extensions of time be severely limited. Our comments on delays of implementation are more fully explained under Section 217.~~12~~[13] below. NFPA believes that more carefully drawn procedures governing the decisions to allow extensions of time will strengthen and facilitate efficient use of the review process.

8. Section 217.11. Content of a Request for Review.

Section 217.11(b)(7) of the Forest Service's proposed rules requests details as to the requester's previous involvement in public participation opportunities. However, the information requested by the proposed rule does not seem to be relevant to any ruling on the merits of a request for review. Because the information requested by this section is extraneous to the review process, this provision should be deleted.

In its place, NFPA proposes language which will: (1) set forth specific criteria designed to discourage repetitive requests for review of issues already previously decided; and (2) require that requesters raise all relevant issues of fact, law, regulation, or policy at the earliest reasonable opportunity.

These requirements will strengthen the review process by ensuring that review decisions have some degree of precedential value, and by discouraging requesters from raising issues for review on a piecemeal basis.

9. Section 217.[12]. Intervention.

As stated under Section 217.4 above, and in our comments on the interim rules on fire salvage (53 Fed. Reg. 17029), provisions for intervention must be included in any new rules for appeal or review. The Agency recognized this need under its proposed Section 251 but was inconsistent in this respect in Section 217. NFPA proposes the addition of a new Section 217.[12] detailing the requirements for intervenor status. We have drafted our proposal for Section 217.[12] to assure that: (1) intervenors cannot cause delay; (2) multiple intervenors on the same appeal or issues under appeal will not encumber the process; and (3) intervenors are a party to any settlement agreement between the Forest Service and requestors in resolving the issues under review.

10. Section 217.~~12~~[13]. Requests to Delay Implementation of a Decision.

This section is renumbered from Section 217.12 and would govern any request for a delay of implementation of land management plans. Implementation of a land management plan which is contrary to the law is improper and should be delayed pending prompt resolution of a request for review. Therefore, we strongly object to the Agency's proposal to allow no requests for delay of implementation of land management plans.

The harm which can flow from implementation of an unlawful land management plan can include immediate and adverse effects upon businesses dependent upon federal timber as a source of supply, and communities dependent upon revenue and employment from timber operations.

In some cases, this impact will occur through immediate implementation of final forest plans which reduce a forest's allowable sale quantity below the amount represented by historic sales levels. Individuals or organizations that would be injured by this action should not be denied a remedy under the rules.

If the requester has satisfied the Reviewing Officer that the delay of implementation is justified under the criterion set forth below in our proposed Section 217.[14], then such a delay of implementation would be appropriate and necessary to avoid unlawful and injurious actions. Accordingly, NFPA recommends deletion of the language barring any delay of implementation of forest plans.

In lieu of the Forest Service's proposed language for Section 217.12(a), we recommend language which will state a carefully crafted condition for justifying delay. A request for delay of implementation should be dismissed as premature where it reasonably appears that the review may be completed without the necessity of delaying implementation. This language will prevent unnecessary and premature requests to delay implementation, yet will still preserve the rights of requesters to seek such delays in appropriate circumstances.

NFPA further recommends the deletion of the Forest Service's proposed Section 217.12(b) which provides no standards for the granting of requests for delay of implementation. The Agency's proposal would result in the automatic granting of stays of all timber sales as long as the Forest Service is unable to complete the notice of decision for a sale well in advance of the scheduled advertisement or auction of that sale. This section should be replaced with language which provides: (1) standards governing the Agency's disposition of requests for delay; and (2) that copies of the request must be provided to any party designated as either the awardee or the high bidder in connection with the sale in question. Designated high bidders or awardees will have a substantial and direct interest in such timber sales, and should be promptly notified of any requests for delay. NFPA's proposed language is renumbered Section 217.[14].

Section 217.12(e) of the Forest Service's proposal must be changed to provide that decisions shall be implemented when delays in implementation are not granted. Absent the granting of a delay, there is no reason to delay implementation of the decision. The integrity of the review process therefore requires that the originally-intended activity proceed. Our recommended language is renumbered at Section 217.[13(d)].

NFPA recommends language replacing Section 217.12(g) which designates the length of time a delay of implementation remains in effect. Changes in facts or circumstances may sometimes occur which would alter the need or justification for continuance of a delay, and in such cases the delay should be modified or dissolved as appropriate. To continue delays under such circumstances could create undue and unnecessary hardship upon parties adversely affected by the delay.

Our substitute would provide the Reviewing Officer with the flexibility to alter or dissolve a delay of implementation when such action is necessitated by changes in factual circumstances. The new language is proposed at Section 217.[13(f)].

11. Section 217.[14]. Content and Consideration of Request to Delay Implementation of a Decision.

In order to effectively apply the conditions described above in evaluating requests for delay, the rules must clearly specify the information to be included in any such requests. Therefore, NFPA recommends the inclusion of language which would: (1) define the terms and conditions under which a delay in implementation may be granted; and (2) require reasonable filing fees to cover the additional administrative costs entailed in processing the request. The provision for a modest fee is appropriate in light of the substantial costs entailed in processing requests for delay in implementation within the tight time periods contemplated under the rules. Further, it would serve to discourage unreasonable, unnecessary, or repetitious requests and purely dilatory tactics, and would be consistent with the filing fee requirements detailed under Section 217.9[(d)] and 217.[(12)(d)] above.

12. Section 217.~~14~~[16]. Authority of Reviewing Officer in Conduct of a Review.

Renumbered from the Forest Service's proposed Section 217.14, NFPA recommends that minor changes in the proposed language be adopted to insure that all parties are notified in a timely manner of procedural decisions in the case of multiple requests for review.

We recommend further the addition of a new paragraph [(d)] to provide for the scheduling of an informal conference of all parties to discuss the issues under review. While it is not our intent to reinstate the oral presentation procedure of the current rules, we believe that an informal discussion of the issues at an early stage in the review may lead to an earlier resolution of the review. Such a conference would be akin to the informal conferences held by the General Accounting Office for many years in which all parties and the deciding government officials meet informally to discuss, and if possible resolve or simplify, bid protests.

It is important that all parties, including the Deciding Officer, be able to interact with the Reviewing Officer in an informal session. This procedure is consistent with: (1) the Agency's overall objective of reducing the formality and complexity of the current appeals process; and (2) the stated purpose to emphasize and/or clarify information related to an appeal under the Agency's proposed section 251.96(a).

13. Section 217.~~15~~[17]. Review Decision.

Section 217.15 is renumbered from the Forest Service's proposal and modified slightly to reaffirm the Agency's commitment to reaching decisions within the time frame established in the rules. Language is also added which would require the decision of the Deciding Officer to respond to the issues raised by the requesters. NFPA believes that the review process, in order to function smoothly and efficiently, must focus on issues raised only by requesters. Intervenors and non-party commentors must file separate requests for review if they desire to raise additional issues.

14. Section 217.~~16~~[18]. Dismissal Without Review and Decision.

Language is added to the Forest Service's proposed Section 217.16 to provide for dismissal of requests for review when the Reviewing Officer determines that the review raises only issues either decided in a previous review or which the requester had a fair opportunity to raise in an earlier review. This language provides consistency with our views on Section 217.11(b)(7) as proposed above.

15. Section 217.~~17~~[19]. Resolution of Issues During Review.

We recommend deletion of the language in the Forest Service's proposed Section 217.17 which would provide that "[a]t the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review to allow for conduct of meaningful negotiations." This change ensures consistency with Sections 217.10 and 217.[14(g)] which provide conditions for the extension of time periods.

NFPA encourages the Agency to conduct negotiations within the framework of appeal deadlines as set forth in Section 217 to the extent possible. We do, however, recognize the benefit of continuing negotiations under extended time periods when parties are not harmed by the extension. Because the provisions for extensions are clearly identified elsewhere in the regulations, there is no need to restate those provisions in this section.

VI. The Forest Service Should Monitor the Status of Forest Plan and Project Appeals, and Include the Results in its Annual Report to Congress.

NFPA restates the recommendation offered in our September 8, 1987 comments to the Chief that the Forest Service can and should do a better job of reporting the status of forest plan and project appeals. A report detailing the status of the appeals process (e.g., the number of appeals filed, average length of time to resolve, number of appeals receiving the discretionary second level of review, issues most commonly raised) should be included in the Agency's Annual Report to Congress. This report would aid the Agency in its efforts to monitor how well the new rules are working in streamlining and efficiently processing appeals and requests for review.

Notwithstanding our comments above -- that the Forest Service must not wait until the new rules have been in effect to assess, and act upon the need for staffing adjustments in order to handle the growing number of appeals -- we encourage the Forest Service to give special emphasis to monitoring of the process as promised in 53 Fed. Reg. 17315. We recommend that the Agency begin to treat the appeals process as a program with specific resource needs and reportable accomplishments, rather than as an afterthought. The Annual Report to Congress should contain an appeals report which tracks the status of the program along the lines described above.

VII. Conclusions

NFPA appreciates the efforts of the Forest Service to develop proposals to streamline and expedite the appeals process. We offer the above comments to assure achievement of these goals, and to provide for a process that is fair to all concerned. We would be happy to discuss and clarify our concerns with you. We look forward to the prompt issuance and implementation of final regulations which will provide the Agency with an effective means to achieve these important goals for planning and project decisions.

July 14, 1988

PROPOSED FOREST SERVICE
APPEAL REGULATIONS

§ 217.1 Purpose and scope.

(a) This subpart provides a process by which a person or organization interested in the management of the National Forest System may challenge certain planned actions prior to implementation and obtain review of the intended action by a higher level official. These rules establish who may request review of planned actions, the kind of decisions that may be challenged, the responsibilities of the participants in a decision review, and the procedures that apply.

(b) The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System decisionmaking prior to implementation of various decisions. The rules are not intended to provide an adjudication process~~. Accordingly, these rules~~ [but to] establish ~~a minimum of~~ procedures to guide the review process. The intent of ~~the~~ [this] part is to provide an expeditious, uncomplicated review of decisions by an official at the next administrative level.

[Comment: Proofreading and clarity.]

§ 217.2 Applicability and effective date.

(a) The review procedures established in this part apply to all disputes of and requests to review decisions filed after [Insert effective date of this rule.].

(b) Requests to review decisions filed under 36 CFR 211.17 and 211.18 prior to [Insert effective date of this rule.] remain subject to those procedures.

§ 217.3 Definitions and terminology.

For purposes of this part--

Deciding Officer means the Forest Service line officer who has the delegated authority and responsibility to make the decision being challenged under these rules.

Decision document means a written document that a Deciding Officer signs to execute a decision subject to review under this part~~.--S~~[, s]pecifically a Record of Decision, a Decision Notice, or Decision Memo.

[Comment: Clarity.]

Decision documentation refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, a project file for proposed actions categorically excluded from documentation in an environmental assessment or environmental impact statement, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

Decision Memo is a concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement.

[Comment: In the May 16, 1988 Federal Register notice of proposed rule, 53 Fed. Reg. 17310, 17319 (1988), the Forest Service stated its intention to publish a separate notice "soon" on the term "Decision Memo" as part of "a larger revision of policies and procedures for compliance with the National Environmental Policy Act." The preparation of Decision Memos and the procedures for giving notice of such decisions are very important aspects of the entire review process. In particular, the issues of when a decision document is required and what information must be included in that document are items of critical concern because the issuance of a Decision Memo may be a threshold requirement for obtaining review under these regulations. NFPA believes that review should not be restricted to activities involving either an environmental assessment, an environmental impact statement or a formal "categorical exclusion" under 40 CFR 1508.4. NFPA looks forward to the opportunity to comment upon this separate notice

and urges the Forest Service to issue that notice as soon as possible so that such comments can be considered in conjunction with the comments on the instant proposed review regulations before they become final.]

Decision Notice means the written document signed by a Deciding Officer when the decision was preceded ~~either~~ by preparation of an environmental assessment (40 CFR 1508.9) ~~or by a determination of categorical exclusion (40 CFR 1508.4)~~.

[Comment: Clarity. This deletion eliminates an apparent area of overlap between a Decision Notice and a Decision Memo.]

Decision review is the term used to refer to the process provided in this part by which a higher level officer reviews a decision of a subordinate officer in response to a request for review.

Forest Service line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this ~~sub~~part. Specifically, for the purposes of this ~~sub~~part, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

[Comment: Clarity.]

[Intervenor is the term used to refer to a person, business entity or organization (or an authorized agent or representative acting on their behalf) other than a requester who has been granted the right to participate as a party in a review under this part.]

[Comment: See proposed new § 217.12 and comment at pages 28-29, infra.]

Record of Decision is the document signed by a Deciding Officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

[Request for delay in implementation is the written document filed with a Reviewing Officer by a requester who seeks to delay implementation of a decision pending completion of the review process.]

[Comment: See comment at page 37, infra, on content and consideration of request for delay in implementation.]

Request for review is the written document filed with a Reviewing Officer by one who objects to a decision covered by this part and who requests review by the next higher line officer.

Requester is the term used to refer to a person[, business entity] or organization (or an authorized agent or representative acting on their behalf) filing a request for review under this part.

[Comment: Clarity.]

[Review Record refers to all decision documentation, all documents relied upon by the Reviewing Officer in deciding the review and all documents submitted to the Forest Service by any requester, intervenor, or commenter in connection with the review; provided, however, that any document required to be provided by a requester or intervenor to another person or organization or business entity which is not provided in a timely fashion shall be stricken from the Review Record and shall not be relied upon by the Reviewing Officer in rendering his review decision.]

[Comment: This addition provides a concise description of the documents that will constitute a review record. Additionally, the failure to provide documents to parties or other persons, organizations or business entities in a timely manner as may be required under this part disrupts the review process and may prevent full and impartial review. Accordingly, such untimely provided documents should be explicitly excluded from the administrative record of the review, and the regulations should speak clearly and authoritatively to this point.]

Reviewing Officer is the line officer one administrative level higher than the Deciding Officer or, in the case of a

discretionary review, one level higher than the line officer who issued a first-level review decision.

§ 217.4 Eligible participants.

(a) Any person, other than a Forest Service employee, or any non-federal organization or [business] entity may challenge a decision covered by this part and request a review by a Forest Service line officer at the next administrative level.

[Comment: Clarity.]

[(b) Any person, other than a Forest Service employee, or any non-federal organization or business entity may intervene, if otherwise qualified under § 217.12.]

[Comment: Clarity and consistency with proposed § 217.12.]

~~(b)~~ [(c)] Any person [, business entity] or organization interested in review of a decision under this part may submit written comments to the Reviewing Officer for inclusion in the review file.

[Comment: Clarity.]

§ 217.5 Obtaining [a] notice of decisions.

[Comment: Clarity.]

For decisions subject to review under this part that are made at the Ranger District, National Forest, and Regional Office levels, the responsible Forest Service official shall publish legal notice of each decision in a newspaper of general circulation, except for decisions documented in Records of Decision, notice of which is published in the Federal Register. For decisions that are made by the Chief that are subject to review under this part, notice shall be published in the Federal Register.

§ 217.6 Decisions subject to review.

(a) Except as provided in § 217.7 of this part, written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of the National Environmental Policy Act, the National Forest Management Act, implementing regulations, policies, and procedures are subject to review under this part.

(1) ~~Only d~~ [D]ecisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to review

under this part. Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act processes made prior to release of final plans, guides, and environmental documents are not reviewable until issuance of decision documents.

(2) Forestry research and State and private forestry programs and activity decisions are subject to review under this part, if a specific decision would be carried out directly on National Forest System lands.

~~(b)--Decisions-subject-to-review-under-this-part-include, but-are-not-limited-to:~~

~~(1)~~ [(3)] Approval, amendment, and revision of a forest land and resource management plan prepared pursuant to 36 CFR Part 219 [are subject to review under this part].

~~(2)~~ [(4)] Approval, and amendment of a regional guide for forest planning prepared pursuant to 36 CFR 219.8 [are subject to review under this part].

~~(3)~~ [(5)] Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest

management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites [are subject to review under this part. However, for projects governed by a final national forest plan, such as timber sales, the scope of review shall be confined to the issue of whether the project complies with the plan; provided that broader review may be permitted by the Reviewing Officer where the requester establishes that changes in factual circumstances or changes in law have occurred since the adoption of the plan or any pertinent amendments which justify a broader scope of review.]

[Comment: Issues of fact or law settled during the adoption of a national forest plan should not be subject to repetitious reargument in a review of a project governed by that plan. The integrity of the planning and the review process requires that the requester bear the burden of establishing that issues beyond compliance with an approved plan should be reviewed. In effect, we are recommending that the review process for activities subsequent to the approval of a final plan be tiered to the review that the plan underwent.]

[(b) In addition to the decisions specified in § 217.6(a), decisions subject to review under this part include, but are not limited to:]

[(1) Decisions implementing Forest Service Manual directives pursuant to 36 CFR § 216 et seq.; and]

[(2) except as provided in § 217.7 of this part, any other written decisions governing activities to be carried out on the National Forest System such as:]

[(i) decisions directing changes in log accountability rules or guidelines;]

[(ii) decisions directing changes in regional scaling rules or guidelines;]

[(iii) decisions directing changes in fire precaution rules or standards;]

[(iv) decisions to implement sealed bidding on a national forest; and]

[(v) decisions to adopt implementation procedures for land management plans.]

(c) Decisions on any of the matters listed in this section made by an authorized subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer to whom the subordinate employee reports.

[Comment: Language has been added to prevent restricting reviews to NEPA-related activities only. Many other types of decisions

currently appealable should not be excluded from the review process. For example, a decision to implement sealed bidding on a national forest, changes in regional scaling rules or guidelines, changes in log accountability rules or guidelines and changes in fire precaution rules and standards may not involve NEPA considerations, yet they are appealable under current rules. Such activities may have far-reaching effects upon industry and dependent communities and should continue to be subject to the review process in order to ensure the best possible policy development and implementation in these complex areas.]

§ 217.7 Decisions not subject to review.

(a) The following decisions are not subject to review under this part:

(1) Decisions appealable to the Agriculture Board of Contract Appeals, U.S. Department of Agriculture, under 7 CFR Part 24.

(2) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(3) Decisions for which the jurisdiction of another Government agency or the Comptroller General supercedes that of the Department of Agriculture.

(4) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to

other entities having final authority to implement the recommendation in question.

(5) Decisions appealable under separate administrative proceedings, including but not limited to, those under 36 CFR 223.117, Administration of Cooperative or Federal Sustained Yield Units; 7 CFR 21.104, Eligibility for Relocation Payment or Amount; and 4 CFR Part 21, Bid Protests.

(6) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(7) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(8) Decisions covered by the Contract Disputes Act.

(9) Decisions involving Agency personnel matters.

(10) Decisions where relief sought is reformation of a contract or award of monetary damages.

(11) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the

Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice in the Federal Register that good cause exists to exempt such decisions from review under this part.

[Comment: NFPA agrees that decisions subject to review under 36 CFR § 211.16 should be excluded from review under Section 217. We have submitted very specific comments on the interim rule which should be addressed in the Agency's final rule governing appeals of such decisions.]

(12) Decisions embodied in rulemaking promulgated in accordance with the Administrative Procedures Act (5 U.S.C. 551 et seq.) ~~or in policies and procedures issued in the Forest Service Manual and handbooks (36 CFR Parts 200, 216)~~.

[Comment: Clarity and consistency with proposed broader scope of review.]

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or to issue order or violations of prohibitions and orders under 36 CFR Part 261.

(14) Decisions solely affecting the business relationship between the Forest Service and applicants for or holders of written instruments for occupancy and use of National Forest System lands that arise from issuance, approval, or administration of ~~the authorization~~ [such written instruments]~~,~~ ~~except as provided for at~~ [which are appealable under] 36 CFR 251.86.

[Comment: Clarity. This deletion eliminates the optional use of 36 CFR 217.1 et seq. by permit and license holders and applicants. This clarifies which procedures will apply and may eliminate unnecessary procedural disputes.]

(b) In addition to decisions excluded from review by paragraph (a) of this section, the Forest Service shall dismiss any request to review a subsequent implementing action that results from an initial decision for projects and activities [previously] subject to review under this part as defined at § 217.6(b)(3). For example, an initial decision to offer a timber sale is reviewable under this part; subsequent actions to advertise or award that sale are not reviewable under this part. A subsequent implementation decision that is documented in a new decision document would be subject to review under this part.

[Comment: Clarity.]

§ 217.8 Levels of review available.

(a) Decisions made below the level of the Chief of the Forest Service.

The rules of this part entitle the public to only one level of administrative review of written decisions by Forest Service line officers below the level of the Chief. The levels of available review are as follows:

(1) If the decision is made by a ~~d~~[D]istrict Ranger, the request for review is filed with the Forest Supervisor;

[Comment: Proofreading.]

(2) If the decision is made by a Forest Supervisor, the request for review is filed with the Regional Forester;

(3) If the decision is made by a Regional Forester, the request for review is filed with the Chief of the Forest Service.

(b) Decisions made by the Chief. If the Chief of the Forest Service is the Deciding Officer, the request for review is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a request to review, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § ~~217.14~~[217.15] of this part.

[Comment: Consistency with proposed renumbering.]

(c) Discretionary review of review decisions. Except for decisions to reoffer returned or defaulted timber sales made after October 30, 1986, review decisions rendered by Forest Service line officers pursuant to this part are subject to discretionary review by the officer at the next higher level.

(1) The levels of discretionary review are as follows:

(i) If the Reviewing Officer is the Forest Supervisor, the Regional Forester has discretion to review.

(ii) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.

(iii) If the Reviewing Officer is [the] Chief, the Secretary of Agriculture has discretion to review.

[Comment: Clarity.]

(2) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review.

(3) Within one day following the date of a review decision rendered by a Forest Service Reviewing Officer, that

officer shall forward a copy to the next higher officer, so the superior officer has full opportunity to exercise the discretion granted in this section.

(4) The higher level officer shall have 15 days from date of receipt to decide whether or not to review, and may call for and use the review file in deciding whether or not to review the decision. If that officer takes no action by the expiration of the 15-day period, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. The requester(s) shall be notified whether or not the decision will be reviewed.

§ 217.9 Filing procedures and timeliness.

(a) Filing procedures. To request review of a decision under this part, a person [, business entity] or organization must:

(1) File a written request for review in accordance with the provisions of § 217.11 of this part with the next higher line officer~~,~~ [and in the case of review requested of a timber sale already offered for bid, simultaneously mail or deliver a copy of the request to any designated high bidder or awardee;]

[Comment: Designated high bidders and awardees have a direct and substantial interest in the sale and should be immediately informed of any such request for review.]

(2) File the request for review within ~~45~~ [30] days of the date notice of the decision was published (§217.5).

[Comment: The vast majority of requests for review will involve issues likely to be followed closely by interested parties and subject to public comment and/or public hearings prior to publication of the notice of decision. Accordingly, 30 days is more than sufficient time within which to require the filing of any requests for review. Shortening this initial time period will have little or no adverse impact on potential requesters, including NFPA and its members, and is consistent with the Forest Service's objective of reducing as much as possible the time required for the review process. NFPA believes that firm deadlines of the shortest reasonable duration for both the public and the Forest Service will significantly improve the efficiency of the review process for the benefit of all concerned.]

[(3) Simultaneously send a copy of the request for review to the Deciding Officer.]

[Comment: Clarity]

[(4) Within one day of receipt of a request for review of a timber sale previously offered for bid, the Reviewing Officer shall mail written notification of the pending request for review to each person or business entity which bid on the sale.]

[Comment: In order to expedite the process, this mailing will alert the most likely potential intervenors of the existence of the appeal. Bidders will then have to assess quickly whether their interest in the appeal is adequately represented, or whether intervention is justified.]

(b) Computation of time periods.

(1) The day after a notice of decision is published (§ 217.5) is the first day of the time period for filing a review request. All other time periods applicable to this part also will be calculated to begin on the first day following an event or action related to the review.

(2) All time periods in this rule are to be computed using calendar days. Saturdays, Sundays, and federal holidays are included in computing the time period for filing a request for review; however, when the filing period would expire on a Saturday, Sunday, or federal holiday, the filing time is extended to the end of the next federal working day.

~~(3)--Simultaneously-send-a-copy-of-the-request-for-review to-the-Deciding-Officer.~~

[Comment: This requirement should be included under Section 217.9 (a) Filing procedures for clarity.]

(c) Evidence of timely filing. It is the responsibility of the party requesting review of a decision to file the request by the last day of the filing period. [Filing may be accomplished by mailing or by personal delivery to the appropriate Forest Service office.] ~~In-the-event-of-question~~, [Where filing is by mail,] a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timely filing of the request. Pursuant to § ~~217.14~~ [214.15] of this part, a Reviewing Officer's decision on timely filing is not subject to review.

[Comment: Clarity and renumbering.]

[(d) Filing fee. Each request for review and to intervene must be accompanied by payment of a $250.00 filing fee.]

[Comment: NFPA believes that requiring a reasonable filing fee to accompany each request will discourage repetitive appeals expressing similar or identical concerns about the same decision, or purely dilatory tactics. This modest fee will also help defray the costs incurred by the agency in processing appeals.]

§ 217.10 Extension of time.

(a) Requests for review [and to intervene]. The time period for filing a request for review or to intervene is not extendable.

[Comment: A request to intervene should be subject to the same strict time limitations as a request for review.]

(b) All other time periods. Requesters, [intervenors,] Deciding Officers, and Reviewing Officers shall meet [all of] the time periods specified in the rules of this part unless a Reviewing Officer has extended the time as provided in ~~this paragraph~~ [paragraphs 217.10(b)(1) - (3)]. ~~Except as noted in~~

~~paragraph (a) of this section, a Reviewing Officer at the levels described in §217.8(a) and (b) of this part may extend all other time periods under this part.~~ [Failure of the Forest Service to meet any time period or, in the alternative, extended time period established pursuant to this section shall result in immediate dismissal of the review and the decision then under review shall be the final administrative decision of the Department of Agriculture. The failure of any party to file its request for review or its request to intervene within the time periods required by this part shall result in either immediate dismissal of the request for review or, as may be appropriate, immediate denial of intervenor status.]

[Comment: NFPA urges the Forest Service to enforce strictly all deadlines involved in the review process. All parties, including the Forest Service, should be required to meet the time periods specified in the rules. The review process consumes important agency resources, may delay the implementation of important agency policies and projects, and can cause individuals and dependent communities to suffer substantial harm. By requiring strict adherence to all time periods, the Forest Service will be imposing a necessary discipline upon itself and all participating parties which will encourage the efficient use of time and resources, discourage requests for review from those with only a casual interest, and prevent foot-dragging by any party.]

~~(1) Where good cause exists, a Reviewing Officer may extend the time for the Deciding Officer to assemble and transmit relevant decision documents. In case of extension, the Reviewing Officer shall notify the requester(s) of the extension and the new date.~~

[(1) Except as noted in paragraph (a) of this section, a Reviewing Officer at the levels described in paragraphs 217.8(a) and (b) of this part may extend all time periods under this part subject to the following restrictions:]

[(i) One or more extensions of time up to a combined total of 20 days may be allowed by the Reviewing Officer, where good cause exists, without the concurrence of any requester or intervenor. However, any extensions of time beyond this 20-day maximum shall be made by the Reviewing Officer only with the consent of all requesters and intervenors involved in the review.]

[(ii) Where multiple requests for review are filed, the Reviewing Officer may also extend the time for the Deciding Officer to assemble and transmit relevant decision documents for a period not to exceed 21 days from the close of the period within which requests for review must be filed without the consent of any requesters or intervenors. In the event of such an extension of time for the Deciding Officer to assemble and transmit relevant decision documents in a multiple request for review, no portion of this extension shall be counted against the 20-day maximum.]

~~(2) Except for discretionary reviews conducted pursuant to § 217.8(c) of this part, a Reviewing Officer may extend the~~

~~time period of issuance of the review decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues pursuant to § 217.17 of this part.~~

[Comment: NFPA believes that the limited flexibility to allow time extensions set forth above will strengthen and facilitate efficient use of the review process.]

§ 217.11 Content of a request for review.

(a) It is the responsibility of those who request review of a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a requester must file a written request with the Reviewing Officer that:

(1) Lists the name, address, and telephone number of the requester;

(2) Identifies the decision to which the requester objects;

(3) Identifies the document in which the decision is contained by title and subject, date of the decision, and name and title of the Deciding Officer;

(4) Identifies specifically that portion of the decision or decision document to which the requester objects;

(5) States the reasons for objecting, including issues of fact, law, regulation, or policy, and if applicable, specifically how the decision violates law, regulation, or policy;

(6) Identifies the specific change(s) in the decision that the requester seeks; and

(7) ~~Identifies whether or not the requester has participated in public participation opportunities offered in the decisionmaking process and, if so, the extent of that participation.~~ [Demonstrates to the Reviewing Officer that the request is not repetitious of any previous request and that the requester has not had a fair opportunity in any previous review to raise the issues raised in this review. Accordingly, the requester shall certify that:]

[(i) The requester believes in good faith that no issue of fact, law, regulation, or policy raised in its request for review has been finally determined in any previous review by the Forest Service and];

[(ii) The requester has not been provided a fair opportunity in any previous review to raise such an issue.]

[(c) Requests for review which are repetitive or involve the rearguing of issues of fact, law, regulation or policy decided in previous reviews or requests for review in which a requester raises an issue which it could have raised in a previous review but did not, shall be immediately dismissed. Also, a false certification under either paragraph 217.11(b)(7)(i) or (ii) shall be grounds for immediate dismissal of the review by the Reviewing Officer. If, at any stage of the review, the Reviewing Officer is persuaded that the request for review is repetitive or that issues raised could have been raised by the requester in a previous review, the request for review shall be immediately dismissed or review restricted by the Reviewing Officer to issues of fact, law, regulation or policy not previously decided or which the requester did not have a fair opportunity to raise under any previous review.]

[Comment: Section 217.11(b)(7) of the Forest Service's proposed draft requests details as to the requester's previous involvement in public participation opportunities, but this information does not seem to be relevant to any ruling on the merits of a request for review. Because the information requested by § 217.11(b)(7) is extraneous to the review process, this provision should be deleted.

In its place, NFPA proposes a new § 217.11(b)(7) which will set forth specific criteria designed to discourage repetitive requests for review of issues already previously decided and to require that requesters raise all issues of fact, law, regulation, or policy which they believe should be reviewed at the earliest reasonable opportunity. These requirements will strengthen the review process by ensuring that review decisions have some precedential value and by discouraging the raising of issues for review on a piecemeal basis.]

[§ 217.12 Intervention.]

[(a) Any person, business entity or organization directly interested in the review and believing in good faith that it may be adversely affected by a reversal or modification of the Deciding Officer's original decision may request intervenor status.]

[(b) Any request to intervene must be submitted in writing to the Reviewing Officer and filed (i.e., mailed or personally delivered) prior to the expiration of 21 days after the filing of a request for review. Copies of the request must be mailed simultaneously or personally delivered to the Deciding Officer, all requesters and other intervenors already parties to the review.]

[(c) Requests for intervenor status must include:]

[(1) The identity of the intervenor, including address and telephone number of an authorized representative;]

[(2) A statement of the intervenor's direct interest in the review;]

[(3) A brief statement of the manner in which the intervenor may be adversely affected by reversal or modification of the Deciding Officer's original decision; and]

[(4) A description of how the intervenors interests vary from those of other requesters and intervenors already involved in the review, or a brief statement of how the requested intervention would facilitate better resolution of the review.]

[(d) Each request to intervene must be accompanied by payment of a $250.00 filing fee.]

[Comment: Consistency with Section 217.9[(d)].]

[(e) Intervenor status shall be granted by the Reviewing Officer if the intervenor's request is filed within the time permitted and it has reasonably demonstrated: (1) a direct interest in the review; (2) that it may be adversely affected by the reversal or modification of the Deciding Officer's original decision; and (3) that its interests differ from parties already involved in the review, or that its participation would facilitate better resolution of the review.]

[(f) The Reviewing Officer shall grant or deny requests for intervenor status within 5 days of receipt of such requests and

give notice of his decision to the requester and all parties which have requested intervenor status. The Reviewing Officer's decision granting or denying intervenor status shall not be subject to review.]

[(g) If the request for review is dismissed or the requester withdraws its request for review at any stage, the review process will conclude, and no intervenor will have the right to continue the review. However, notwithstanding that the Deciding Officer, the Reviewing Officer and other Forest Service officials may at any time confer with anyone in an effort to obtain information or to resolve a request for review, no compromise or settlement of issues raised in the review shall be agreed to by the Forest Service without the written consent of all intervenors and requesters.]

[Comment: NFPA believes that intervenor status is essential to ensuring the integrity and efficiency of the review process. Fundamental fairness requires that parties be permitted to intervene in requests for review which could result in serious adverse consequences for those parties. Without such intervention, parties adversely affected have no recourse other than to request review of any decisions modified and reissued as a result of a previous request for review to which they were not a party. This review in turn may result in requests for review by other excluded parties in the event the decision continues to change. The only practical way of dealing with this situation is to encourage all interested parties to participate in a single request for review under which all parties will be bound. This will also ensure that the Forest Service receives the benefit of all conflicting points of view in making its final administrative decision. NFPA believes that if intervenors are held to the same time periods as requesters and no delay results from intervention, it simply makes practical sense to allow it. Also, NFPA believes that if intervention is allowed, it is appropriate that the intervenor should not be able to continue the review

process if the request for review is denied or withdrawn. Finally, repetitive interventions can be discouraged by compelling potential intervenors to document that they represent an interest not already represented by one of the existing parties in the review, or that they can provide information that will facilitate better resolution of the review. Under these limitations, intervenor status promotes good policy and efficient use of the review process without any significant procedural delay.]

§ ~~217.12~~ [217.13] Requests to delay implementation of a decision.

(a) ~~Requests to delay implementation of land and resource management plans prepared pursuant to 36 CFR Part 219 shall not be granted~~. [Requests to delay implementation of a decision shall be denied as premature where it appears that the review will be completed prior to the date on which the decision will be implemented.]

[Comment: Implementation of a land and resource management plan which is contrary to the law is improper and should be delayed pending prompt resolution of a request for review. The harm which can flow from implementation of an unlawful land and resource management plan can include immediate and adverse effects upon businesses dependent upon federal timber as a source of supply and communities dependent upon revenue and employment from timber operations. If the requester has satisfied the reviewing officer that the delay of implementation is justified under the criterion set forth below in § 217.13(b) as proposed by NFPA, then such a delay of implementation would be appropriate and necessary to avoid unlawful and injurious actions. Accordingly, NFPA recommends deletion of the language barring any delay of implementation of forest plans.

In lieu of the Forest Service's proposed language for § 217.12(a), NFPA recommends language which will make explicit an apparently implicit provision of these regulations; namely, that a request for delay of implementation should be dismissed as premature where it reasonably appears that the review may be

completed without the necessity of delaying implementation. This explicit language will prevent unnecessary and premature requests to delay implementation, yet will preserve the rights of requesters to seek such delays in appropriate circumstances.]

~~(b) Where a project or activity would be implemented before a review decision could be issued which would moot the review, the Reviewing Officer shall accept and grant written request to delay implementation of the decision pending completion of the review, unless the Reviewing Officer determines there is an urgent, compelling need to proceed with the project.~~

[Comment: A delay in implementation is closely akin to a court-ordered injunction preventing the Forest Service from implementing important projects or activities. Accordingly, a request for delay of implementation should not be granted automatically without any consideration of the merits of the underlying request for review or the harm which may occur if the request is granted. NFPA recommends that requests for delay of implementation be granted only where there is a substantive justification. See proposed § 217.14, "Content and Consideration of Requests to Delay Implementation of a Decision". In the alternative, if the Forest Service retains § 217.12(b) above, the term "urgent" should be deleted as redundant and ambiguous.]

[(b) Filing a request for delay of implementation. To request a delay in implementation of a decision a requester must file a written request with the Reviewing Officer and simultaneously provide a copy of that request to the forest officer who made the initial decision in question. Copies must also be provided within one day by the party seeking the delay to any intervenors participating in the review and, in the case of a request for delay in implementation of a timber sale, copies of

the request must be provided within one day to any party designated as either the awardee or the high bidder in connection with that timber sale if that party is not also an intervenor.]

[Comment: Designated high bidders or awardees will have a substantial and direct interest in such timber sales. They should be promptly notified of any requests for delay of implementation.]

~~(c)--The-requester-must-file-the-request-to-delay implementation-with-the-Reviewing-Officer,-and-provide-a-copy-to the-Deciding-Officer.~~

~~(d)~~[(c)] The Reviewing Officer shall rule on delay requests within 10 days of [receipt of] a request and shall give notice of the decision to the requester(s) [, intervenors] and the Deciding Officer [and, in the case of a request for delay in implementation of a timber sale, to any person or business entity designated as either the awardee or the high bidder].

[Comment: Clarity.]

~~(e)~~[(d)] A decision ~~may~~ [shall] be implemented ~~during-a review~~ unless a Reviewing Officer has granted a delay in implementation.

[Comment: Absent the granting of a delay in implementation, there is no reason not to implement the decision, and the integrity of the review process requires that the originally intended activity proceed. This also reinforces the principle

that a premature request for delay of implementation will be dismissed in accordance with NFPA proposed § 217.13(a).

~~(f)~~[(e)] A Reviewing Officer's decision on a request to delay implementation of a ~~project or activity~~ [decision] is not subject to review at the next administrative level.

[Comment: Clarity.]

~~(g) When a delay in implementation is granted, is shall, at a minimum, remain in effect until the end of the 15 day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.8(c)). If the higher level officer decides to review the Reviewing Officer's decision, implementation shall be delayed until a decision is issued, or until the end of the 30 day review period provided in § 217.15(c), whichever is less.~~

[(f) If a delay in implementation is granted, it shall remain in effect so long as the facts and circumstances justifying the delay continue and through the conclusion of the review, including the time during which a higher level officer must decide whether or not to review a Reviewing Officer's decision §217.8(c)). If the higher level officer decides to review the Reviewing Officer's decision, the delay in implementation shall ordinarily be continued until a decision is issued, or until the end of the 30-day review period provided in §217.16(d), whichever is less; provided, however, that at any time during the review the Reviewing Officer may modify or dissolve the delay in implementation if he believes that the facts and circumstances before him no longer justify granting such a delay. A determination by the Reviewing Officer dissolving or modifying the delay in implementation previously granted shall not be reviewable, and the Reviewing Officer shall immediately give notice of any such determination to all parties to the review.]

[Comment: The foregoing change is recommended to clarify the duration of any delay in implementation and to provide the Reviewing Officer with the flexibility to alter or dissolve a delay in implementation when such action is called for by changes in factual circumstances.]

~~§-217.13--Review-file.~~ [§ 217.14 Content and consideration of request to delay implementation of a decision.]

[(a) Content of written request for a delay of implementation. Any request for a delay in implementation must contain the following information:]

[(1) A description of the specific harmful impacts or adverse effects which the requester believes will occur if the delay in implementation is not granted, including but not limited to any anticipated site-specific adverse effects on any resource area affected by the activity in question;]

[(2) A description of the specific harmful impacts or adverse effects which may occur if the delay in implementation is granted, including but not limited to an assessment of any such harmful impacts or adverse effects on individuals or business entities and whether such impacts may adversely affect community stability;]

[(3) A statement of how the anticipated impacts and effects would prevent a meaningful decision on the merits; and]

[(4) In the case of delays in implementation sought with respect to timber sales, the identity of any individual or business entity designated as high bidder or awardee with respect to that sale who is not also an intervenor in the review.]

[(b) Any request for a delay in implementation shall be immediately denied if it does not contain the information specified in § 217.14(a).]

[(c) Consideration of Request to Delay Implementation. In deciding whether or not to grant a delay in implementation the Reviewing Officer will first determine whether there is a substantial likelihood that the requester will prevail on the merits of the review. If the requester is not substantially likely to prevail, then the Reviewing Officer will immediately deny the request for delay of implementation. If, however, the

Reviewing Officer determines that the requester is substantially likely to prevail on the merits of the request for review, then the Reviewing Officer will apply a balance-of-hardships test. Specifically, the Reviewing Officer will weigh the likelihood and severity of the harmful impacts or adverse effects occurring if the delay is not granted against those harmful impacts or adverse effects likely to occur if the delay is granted. The Reviewing Officer will grant the delay in implementation only if granting the delay would, on balance, be more likely to cause less harmful impacts or adverse effects than denying the delay.]

[(d) Immediately upon receipt of a request for delay in implementation, the Reviewing Officer shall notify by telephone all intervenors participating in the review, and, in the case of a timber sale, any business entity or individual designated as the apparent high bidder or the awardee of the sale. Written confirmation of the telephonic notification shall be promptly mailed or delivered by the Reviewing Officer to each party so notified.]

[(e) Any interested party, including any intervenor or adversely affected individual, business entity or organization may submit comments on the request for delay in implementation to the Reviewing Officer; however, the 10 calendar day period in which the Reviewing Officer must decide the request for delay in implementation shall not be extended.]

[(f) The Reviewing Officer shall promptly inform the requester, all intervenors and any individuals, business entities or organizations submitting comments of his decision regarding the request for delay in implementation.]

[(g) No time extensions after a delay is granted. In the event that a delay in implementation is granted, there shall be no further time extensions allowed in the review, except as provided in Section 217.10(b)(1)(i), and all parties, including the Forest Service, shall strictly abide by the remaining time periods applicable to that review. Further, the Reviewing Officer shall issue the review decision either within 10 days of the granting of the delay in implementation or within the time period then remaining to the Reviewing Officer under that review, whichever is greater. Provided, however, where a delay in implementation has been granted, from the last date on which requests for review may be filed, the Reviewing Officer may take no more than 131 days within which to issue the review decision with respect to a plan and no more than 71 days with respect to a project, activity, or timber sale regardless of any previous extension of time.]

[(h) Each request for delay in implementation must be accompanied by payment of a filing fee in the amount of $250.00

to cover the additional administrative costs entailed in processing the request.]

[Comment: NFPA recommends the inclusion of the foregoing language defining the terms and conditions under which a delay in implementation may be granted and requiring a reasonable filing fee. A reasonable filing fee will discourage unreasonable, unnecessary, or repetitious requests and purely dilatory tactics. This provision is also appropriate in light of the substantial costs entailed in processing requests for delay in implementation within the tight time periods contemplated under the rules.]

§ ~~217.13~~ [§ 217.15] Review file.

[Comment: Renumbering.]

(a) It is the responsibility of the Reviewing Officer to assemble and maintain in one location a file of documents related to the decision and review.

(b) The review of decisions under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct a decision review consists of the request for review, any written comments submitted by interested parties, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any decision-review related correspondence, including additional information requested by the Reviewing Officer pursuant to § ~~217.14~~ [217.16] of this part.

[Comment: Renumbering.]

(c) Upon receipt of a copy of the request for review, the Deciding Officer shall assemble the relevant decision documentation (§ 217.3) and pertinent records and transmit them to the Reviewing Officer within 21 days.

(d) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate [in the transmittal letter] how and where the documentation addresses the issues raised in the request for review~~.--The Deciding Officer may also~~ [and shall] respond ~~briefly~~ [concisely] to [the] issues raised in the request for review. The Deciding Officer shall provide a copy of the transmittal letter to the requester(s) [and any intervenors].

[Comment: The transmittal letter need not be as detailed as a responsive statement under the current regulations, but a concise response will aid the Reviewing Officer and greatly assist the parties in understanding the basis for the original decision. This in turn will promote better reasoned policy development and implementation.]

(e) Unless the Reviewing Officer has ruled otherwise or has requested additional information pursuant to § ~~217.14~~[217.16](c) of this ~~sub~~part, the review file will close upon receipt of the decision documentation from the Deciding Officer.

[Comment: Clarity and renumbering.]

(f) The decision review file is open to public inspection.

(g) The rules of paragraphs (a) through (e) of this section apply only to the review file at the first level of review (§ 217.8(a) and (b)). Where an official exercises the discretion in § 217.8(c) of this subpart to review a review decision, the discretionary review shall be made on the existing review file, the Reviewing Officer's review decision, any orders of the Reviewing Officer to extend a delay of implementation, and any petitions to change or lift a delay of implementation. The file shall not be reopened to accept additional submissions from any party to the review or from the Reviewing Officer whose review decision is being reviewed.

§ ~~217.14~~ [217.16] Authority of reviewing officer in conduct of a review.

(a) Discretion to establish procedures. A Reviewing Officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the

review [except that no time period may be extended other than as provided in § 217.10].

[Comment: Clarity.]

(1) In case of multiple requests for review of a decision, the Reviewing Officer may prescribe special procedures as necessary to conduct the review **[and shall do so as soon as possible after the period within which a request for review must be filed has expired].**

[Comment: Clarity.]

(2) The requester(s)[, any intervenors] and [the] Deciding Officer shall receive notice of any procedural instructions or decision governing conduct of a review.

[Comment: Clarity.]

(3) Procedural instructions and decisions are not subject to review by higher level officers.

(b) Consolidation of multiple requests for review. The Reviewing Officer shall determine whether to issue one review decision or separate decisions in cases of multiple requests for review of the same decision. In the event of a consolidated decision, the Reviewing Officer shall give advance notice to all who have requested review of the decision [and to any intervenors].

[Comment: Consistency with § 217.12 allowing limited intervention.]

(1) Decisions to consolidate a review decision are not subject to review by higher level officers.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may consolidate transmittal of decision documentation to the Reviewing Officer and respond to statements in multiple requests for review in one transmittal letter.

(c) Requests for additional information. At any time during the review, the Reviewing Officer conducting a review at the levels specified in § 217.8(a) and (b) of this part may request additional information from a requester, the Deciding Officer, [any intervenors,] or anyone who has submitted written comments related to the review. At any level of review (§ 217.8), the Reviewing Officer may discuss issues related to review of a decision with the Deciding Officer (or first level Reviewing Officer), requesters[, any intervenors] or those who comment on a pending review, or their authorized agents or representatives, as needed to clarify information submitted or to seek resolution of the issues in question.

[Comment: Clarity.]

[(d) Conference of the parties. At any time during the review prior to the expiration of the time within which intervention may be requested, any requestor or intervenor may request the Reviewing Officer to schedule a conference for the purpose of clarifying the positions of the parties and the Deciding Officers and to facilitate resolution of the issues raised in the review.]

[(1) The Reviewing Officer shall grant a request for a conference unless he determines that the conference would not facilitate resolution of the review.]

[(2) As soon as possible after receipt of a request for a conference, the Reviewing Officer shall notify the Deciding Officer and all other requestors and intervenors of the request and shall schedule the conference for the earliest reasonably convenient date. The Deciding Officer shall be required to attend the conference and each requestor and intervenor shall be invited to attend.]

[(3) The format of the conference shall be an informal discussion presided over by the Reviewing Officer in which each participant shall be free to ask and answer questions concerning

the issues under review and the positions of the parties, including the Deciding Officer.]

[Comment: While NFPA believes that the proposed elimination of formal oral presentations will expedite the review process and will not preclude the fair presentation of contrasting points of view, NFPA also believes that an informal discussion of the issues under review at a relatively early stage in the review will significantly aid the Reviewing Officer and all parties in understanding the issues and may lead to an early resolution of the review. Accordingly, NFPA proposes a procedure for scheduling an informal conference of the parties which we believe may advance these goals without adding any significant delay to the review process. Such a conference would be akin to the informal conferences held by the General Accounting Office for many years in which all interested parties and the deciding government officials meet informally to discuss and if possible resolve or at least simplify bid protests.]

~~(d)~~ [(e)] Conduct of review of decisions made by the Chief. When the Secretary elects to review an initial decision made by the Chief (§ 217.8(b)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this part.

[Comment: Renumbering]

~~(e)~~ [(f)] Conduct of other discretionary reviews. Where a higher level officer elects to review a decision rendered by a Reviewing Officer (§ 217.8(c)), the rules of this section do not apply, except that, as provided in paragraph (c) of this section, the officer conducting the discretionary review may discuss issues related to the review with the first level Reviewing

Officer, the requester(s), [any intervenors] or those who submitted comments.

[Comments: Renumbering]

§ ~~217.15~~ [217.17] Review decision.

(a) The Reviewing Officer ~~should~~ [shall] issue a final review decision within 30 days of the receipt of decision documentation from the Deciding Officer, except that for review of land and resource management plan approval, amendment, or revision decisions, the Reviewing Officer may take [up to] 90 days to issue a decision. The Reviewing Officer shall notify the requester(s)[, intervenor(s)] and [the] Deciding Officer if more time is needed [as may be permitted under §§ 217.10 and 217.14] and [of] the new date. The Reviewing Officer shall send a copy of the decision to any requester, [intervenors,] the Deciding Officer, and to others upon request.

[Comment: Clarity and Renumbering.]

(b) The Reviewing Officer's decision shall affirm or reverse the original decision in whole or in part. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer [and shall respond to the issues raised by the requesters. The Reviewing Officer is not required to address

any additional issues raised by intervenors or in comments submitted by non-parties].

[Comment: In order to function smoothly and efficiently, the review process must focus on issues raised only by requesters. Intervenors and non-party commenters must file requests for review in a timely manner if they desire to raise additional issues.]

(c) A review decision must be consistent with applicable law~~,~~ [and] regulations~~, and orders~~.

[Comment: The generic reference to "orders" in the above language is unclear. The reference to "law and regulations" should be adequate.]

(d) Unless a higher level officer exercises the discretion to review a Reviewing Officer's decision as provided at § 217.8, the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and that decision is not subject to further review under this part.

(1) In the case of a discretionary review pursuant to § 217.8, the second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to a requester that the lower level decision will be reviewed.

(2) If a discretionary review decision is not issued by the end of the 30-day review period, the review is automatically terminated and the decision of the lower level Reviewing Officer

stands as the final administrative decision of the Department. In such case, the requester(s) [and any intervenors] shall be notified.

[Comment: Clarity.]

§ ~~217.16~~ [217.18] Dismissal without review and decision.

(a) A Reviewing Officer shall dismiss a request for review and close the review file without decision on the merits when:

(1) The request is not received within the time specified in § 217.9 of this part;

(2) The requested relief or change cannot be granted under existing law, fact, or regulation;

(3) The request for review fails to meet the minimum requirements of § 217.11 of this part to such an extent that the Reviewing Officer lacks adequate information on which to base a decision [or the Reviewing Officer determines that the review only raises issues decided in a previous review or only issues which the requester had a fair opportunity to raise in an earlier review but failed to do so];

[Comment: Clarity and consistency with § 217.11(b)(7).]

(4) The decision at issue is being reviewed under another administrative proceeding;

(5) The decision is excluded from review pursuant to § 217.7 of this part;

(6) The requester(s) withdraws the request for review; or

(7) The Deciding Officer withdraws a decision.

(b) Dismissal decisions are not reviewable by the next higher officer.

§ ~~217.17~~ [217.19] Resolution of issues during review.

(a) At any time during the decision review process, the Deciding Officer may discuss the issues in dispute with the requester(s)[, any intervenors] and other persons and seek resolution of the issues in dispute. ~~At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review to allow for conduct of meaningful negotiations.~~

[Comment: Clarity.]

(b) The Deciding Officer has the authority to withdraw the decision at issue during the review period. If the Deciding Officer decides to withdraw the decision, ~~both~~ the Reviewing Officer ~~and~~[,] the requester(s) [and any intervenors] shall be notified, and the Reviewing Officer shall close the review file and notify the requester(s) [and any intervenors] that the case is dismissed. A Deciding Officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to review under this part.

[Comment: Clarity.]

§ ~~217.18~~ [217.20] Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part.

NFPA

MARK E. REY
VICE PRESIDENT
PUBLIC TIMBER
202 463-2750

September 8, 1987

Mr. F. Dale Robertson
Chief
U.S. Forest Service
P.O. Box 96090
Washington, D.C. 20013-6090

Dear Chief Robertson:

Attached are the comments of the National Forest Products Association on the Forest Service's June 11, 1987 request (52 Fed. Reg. 22348) for comments on the current Forest Service administrative appeals process governed by regulations presently found at 36 CFR §211.18. NFPA offers these comments on behalf of its member companies that own and manage forest lands, and manufacture solid wood products. A substantial number of NFPA's members purchase timber from the national forests, and have -- either through NFPA, one of its affiliated associations, or on their own -- been involved in appeals of Forest Service decisions.

We offer the attached suggestions with the full understanding that they would, if adopted, constitute a dramatic departure from the current appeals process. As we indicate within, NFPA believes that the present state of the appeals process warrants changes of this magnitude. Neither the Forest Service nor the public are well served by the existing procedures.

In sum, NFPA recommends that the appeals process be divided into two separate procedures -- one for project-level appeals, and one for national forest plan appeals. For project level appeals we suggest a simpler, more expeditious proceeding with: (1) only one guaranteed level of appeal; (2) tight deadlines for filings and decisions; (3) better coordination with other agency programs; and (4) a narrower standard of review -- compliance with a final forest plan.

With respect to national forest plan appeals, NFPA recommends that these appeals be adjudicated through a more formal appellate process conducted by a Board of Forest Plan Appeals separate from the Forest Service, within the Office of

NATIONAL FOREST PRODUCTS ASSOCIATION
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the Secretary of Agriculture. Here again, we suggest tighter deadlines for filings and decisions. NFPA also recommends that the Agency should develop specified procedures for conducting settlement negotiations on forest plan appeals in order to address the considerable confusion that exists in this area.

The forest industry commends the Forest Service for undertaking this essential review of its administrative appeals regulations. Our comments have been delayed slightly because we wanted to fully reflect on the changes the industry has proposed. NFPA does not make the attached suggestions lightly.

We look forward to working closely with you and the Agency's Appeals Task Force as you go about the task of preparing a proposed rule. I will be in touch with the Task Force shortly to set a meeting date to discuss our comments. If you or your staff have any questions on the above or attached materials, please do not hesitate to call us at NFPA.

Sincerely,

Mark Rey

MR/jcr

Attachment

Comments of the National Forest Products Association on the U.S. Forest Service Regulations Governing Administrative Appeals

I. INTRODUCTION

The U.S. Forest Service has published a notice in the June 11 Federal Register that it "is beginning a review of the [appeals] rules as required by E.O. 12291." (52 Fed. Reg. 22348). The notice also indicates that the Forest Service "is particularly interested in how well the process meets current needs and is likely to meet future needs and what the public likes and dislikes about it." (Ibid.) The Agency is accepting public comments on these matters, and has formed an internal task group to commence the review of the adequacy of the appeals regulations currently found at 36 CFR §211.18.

Following is the National Forest Products Association's response to the Agency's request for comments on the present appeals regulations. Both NFPA as well as many of our members have been involved in appeals of Forest Service decisions using the procedures specified in 36 CFR §211.18. Therefore, our views are based upon considerable recent experience, and in some cases frustration, with the appeals process.

It is because of this frustration with the present process that NFPA commends the Forest Service for undertaking this essential review of its administrative appeals regulations. For the reasons discussed below, we urge that this review be expedited and given high priority within the Agency.

Before offering our views as to how the appeals process should be modified, it would be useful to reflect upon our understanding as to how the appeals procedures came to be the way they are today. It is our sense that the Forest Service's institutional outlook about how to modify the present regulations is heavily influenced by what has come before.

II. THE FOREST SERVICE'S ADMINISTRATIVE APPEALS PROCESS HAS EVOLVED OVER TIME TO MEET NEEDS QUITE DIFFERENT FROM THOSE PRESENTLY FACED BY THE AGENCY.

A. Historically, the Agency Has Favored a Less Formal Appeals Process.

Since the early 1970's the Forest Service has utilized an internal, line-operated review process. This process has emphasized a higher-level review of the decisions of line officers to assure that they are "right," with little distinction among issues of fact and issues of law.

This procedure replaced a more formal Board of Forest Appeals within the Department of Agriculture which existed in the late 1960's and provided a more formal review process for certain prescribed types of Forest Service decisions. A primary reason for the change was to broaden the types of Forest Service decisions that could be reviewed through the appeals process. Additionally, the Agency was interested in a less formal, almost policy-oriented review of lower-level decisions. The experience with the Board of Forest Appeals was apparently not satisfactory to Forest Service line officers.

The ideal process appeared to be one unencumbered by a reliance on complicated administrative or legal procedures or lawyers. The guiding principle was that anyone with a grievance and a postage stamp should be able to secure a higher-level review of a Forest Service decision. The appeals process was, and to a great extent still is, more a managerial tool for testing the soundness of day-to-day decisions than a formal means of adjudicating disputes.

This approach seemed to serve the Forest Service well through the late 1970's and into the early part of this decade. The regulations governing the present appeals process have been revised three times since their inception, most recently in June 1987 (52 Fed. Reg. 23175).

B. The Advent of Appeals Over National Forest Management Act (NFMA) Land Management Plans Has Swamped the Present Appeals Process.

Since 1980, the Agency's appeals workload has almost doubled. More significantly, since the beginning of FY 1985 the rate of increase of appeals brought to the Forest Service's Washington Office has been the most pronounced; with 247 in FY 1985, 413 in FY 1986, and 301 so far in FY 1987.

While appeals over other types of decisions have fluctuated in number over the last few years, the large increase in appeals over the last two years has been attributed almost solely to appeals over land management plans prepared under the provisions of the National Forest Management Act. These appeals constituted almost two-thirds of the appeals pending in the Washington Office at the beginning of FY 1987.

Since plan appeals started reaching the Washington Office during FY 1985, 418 have been filed. Of these the Agency has resolved 185, or 44 percent. However, most of these were either dismissed without reaching the merits, or withdrawn. The Agency has rendered substantive decisions on only one fifth of the appeals resolved, or less than ten percent of the appeals filed to date. In order to make any progress in reducing the backlog of plan appeals pending at the beginning of FY 1987, the Forest Service would have to issue a decision each day for the remainder of this calendar year.

NFPA is not aware of any data compiled on the average length of time necessary to issue an appeal decision. However, we do know of three unresolved appeals on Region 2 plans brought by the forest industry where the appeals were brought, on the average, almost 19 months ago. In Region 1, the forest industry is involved in five plan appeals still pending that average almost 15 months old.

The duration of time for appeals pending in Regions 1 and 2 is of significance because, among all of the regions, these were the earliest to produce plans with significant timber volumes and complex issues under appeal. While other regions have since produced plans with complex appeals still pending, the timeline for each appeal is not yet as long, simply because the clock started later.

Moreover, it is misleading to merely look at averages in assessing the problem of timely appeal resolution. First, the clock has begun running at various starting points, as described above. Only when each appeal has run its course to resolution can the elapsed time be compared on an equal basis. In addition, a number of appeals have been filed on each forest that -- due to the frivolous nature of the appeal or the lack of significant reasons -- have been resolved quickly. When averaged with the more serious and complex appeals, the true picture of the current situation becomes distorted.

However, the above numbers are unnerving, particularly in light of the fact that final plans for the most complex and controversial forests in Idaho, Oregon, Washington, and California are still before us. In addition to the sheer number of forest plan appeals, it is clear that these are the most complex appeals which the Forest Service has ever had to address. A typical forest plan appeal involves: (1) an administrative record of several hundred pages; (2) numerous and mixed issues of both fact and law; (3) multiple appellants and interveners; (4) hundreds of pages of filings by the Forest Service, appellants, and interveners; and (5) a variety of stay-related questions dealing with the implementation of the plan during the pendency of the appeal.

The time and complexity involved in resolving forest plan appeals is creating an additional problem. We suspect that it is slowing down decisions on what should be simpler, project level appeals. First, the staff time taken up with forest plan appeals makes it difficult for the Agency to devote time to other appeals. Second, as Forest Service Regional Office staff are beginning to realize, the complexity of procedure, detail of filings, and militancy of appellants is beginning to spill over into project appeals. This seems to be particularly the case on forests with plan appeals pending. Finally, the Agency's appeal regulations do not: (1) include any Agency guidance on prioritizing appeals; or (2) specify a procedure whereby an appellant may request an expedited decision for a project under appeal.

It may be that the current problems described above are a function of the first round of forest plan appeals, and will, therefore, dissipate once these appeals are resolved. It is, nonetheless, clear that some changes must be made now if we are to see these appeals resolved.

III. THE DELAYS CURRENTLY BEING EXPERIENCED IN RESOLVING APPEALS DECISIONS LEAD US TO OUR FIRST RECOMMENDATION -- THE APPEALS PROCESS SHOULD BE SPLIT, WITH PROJECT LEVEL APPEALS HANDLED THROUGH A DIFFERENT SYSTEM THAN FOREST PLAN APPEALS.

The situation described above leads us to an initial conclusion: the present Forest Service appeals process is not designed to productively handle forest plan appeals and, because of the problems created by these appeals, is no longer handling project level appeals as efficiently as it once did. NFPA, therefore, recommends that the Agency bifurcate the present appeals process and deal with project appeals and forest plan appeals through two separate sets of procedures.

Our specific recommendations about each set of procedures are provided in Sections IV and V below. Basically, NFPA recommends a simplification of the existing appeals process for project appeals, and the development of a more formal, administrative appellate process for forest plan appeals. We believe that this more formal appeals process will be needed to complete at least the first round of forest plan appeals in an expeditious and equitable fashion.

We do not lightly make recommendations of this sweeping a nature. Nor do we believe that the lengthy delays discussed above -- while problematic -- are, alone, grounds for changes of this magnitude. Rather, we have become convinced that the changes we advocate are now essential to insure: (1) the timely completion of final forest plans; (2) the equitable resolution of pending appeals; and (3) the careful adjudication of appellants' concerns. Before turning to our specific recommendations, we will briefly discuss each of the problems in turn.

A. The Fact that the Washington Office Planning Staff Must Hear Plan Appeals Is Hampering the Quality, Consistency, and Timing of Final Plans.

Under the present structure of the appeals process for forest plans, the same Washington Office staff is responsible for both directing the planning process and dealing, on the Chief's behalf, with administrative appeals of final plans. There are some obvious problems with this arrangement.

First, there is simply not enough time for the same group of people to both move the planning process toward completion, and simultaneously resolve appeals expeditiously. Both functions suffer as Washington Office review of near-final plans slows down and appeals mount.

Second, the ability of the Washington Office staff to assure consistency in plans and adherence to national direction is diminished. The Washington Office staff cannot intervene directly to correct a flawed plan or overrule a subordinate in the field because they then could not later hear an appeal over a decision in which they took part. Consequently, flaws in final plans which might otherwise have been corrected with some specific direction from the Washington Office cannot be adequately addressed.

Third, there is a strong appearance of impropriety when the same individuals that sit in judgement on an appeal, may -- by virtue of their position within the Agency -- have had the opportunity to participate in the original decision under appeal. Interestingly, the Public Land Law Review Commission (PLLRC) recommended creation of the Interior Board of Land Appeals in 1970 after reviewing the same situation with respect to Bureau of Land Management decisions. The PLLRC recommended an appeals review process that was "adequately insulated from management officials and legal advisors who have participated in decisions below, except for direct, open presentation of argument in support of their decisions" (One Third of the Nation's Land, p. 255).

In making this recommendation, the PLLRC did not find any evidence of impropriety. The Commission in fact noted that the "available evidence does not fully substantiate this claim" (Ibid, p. 254). The PLLRC recommended the creation of the Interior Board primarily as a means of increasing efficiency and eliminating the appearance of partiality.

The PLLRC also noted that separate and impartial review within Interior was acceptable. The Commission indicated that "[t]o the extent that wholly independent review of agency decisions is needed, we believe that court review is more direct and more consistent with our constitutional view of the separation of powers" (Ibid). So it is with the Forest Service that a separate review group or board could perform the appeals function better.

B. The Delays in Issuing Decisions Are Getting Close to Mooting Some of the Issues Raised.

We have already discussed the length of time the Agency is taking to render decisions. It does not compare favorably, for example, with the average time that the Department of the Interior's Board of Land Appeals takes to dispose of cases -- 8.8 months from receipt of the record -- on Bureau of Land Management lands.

We have also conceded that, by itself, delay is not automatically a problem. However, in this case the Forest Service is implementing the plans that are being challenged. While the Agency has received 90 stay requests, it has granted only 12 in full. The criteria for granting a stay are very narrow, and favor appellants that desire to stop development during an appeal, rather than appellants that desire to assume the achievement of existing, or in some cases planned, output levels during an appeal.

For example, if an appellant is challenging the allowable timber sale quantity provided by a final plan, it appears that it could take almost one-third of the 10-year life of the plan to resolve the dispute. This is a serious limitation on an appellant's ability to seek redress irrespective of whether he wants to raise or lower the allowable sales quantity. Moreover, the appellant has little outside recourse because the issue is not ripe for judicial review until the administrative appeal remedy is exhausted.

In short, we are rapidly approaching a point where delay will affect the substantive outcome of some appeals. The ripple effect of delays caused by plan appeals is having a similar effect on the amount of delay and the substantive outcome of project appeals.

C. The Attention to Procedural Detail Required to Adjudicate Complex Issues Has Been Difficult for the Agency to Master.

The complexity of the plan appeals and the more detailed procedural matters attendant to these appeals have confounded an Agency staff more accustomed to, and comfortable with, a less formal type of review. Consequently, procedural detail is probably not given the attention it deserves, due in part to a preoccupation with the appeals workload that currently exists.

For example, procedural issues such as standing for intervenors are not expedited ahead of the substantive issues raised by existing parties. There have also been errors in notifying parties of developments in an appeal or even final decisions. On other occasions, the Agency has not provided adequate grounds for decisions on standing, stays, or other procedural matters. Finally, the Agency has, without explanation, exceeded its own deadline for rendering decisions on stay requests. It has also unilaterally granted itself time extensions for other filings.

In short, the Forest Service's emphasis in getting to the substance of the issues under appeal -- while laudable -- is resulting in a de-emphasis on procedure that will create an impression of denying appellants due process. This is a serious quality control problem that must be addressed.

IV. THE EXISTING APPEALS PROCEDURES SHOULD BE SIMPLIFIED AND EXPEDITED FOR DEALING WITH PROJECT-LEVEL APPEALS.

As indicated above, NFPA believes that the process for resolving administrative appeals for individual projects should be simplified and expedited. We believe that the original idea of a relatively quick and simple review of a decision as described above is both still desirable and now even more appropriate in light of the time being spent addressing substantive resource management concerns as part of the forest planning process. Several suggestions for simplifying the process are presented below.

A. Limit Appeals on Projects to One Level of Review and Make Decisions Final Agency Actions with Precedential Value

It is our view that the opportunity to elevate appeals to a second level within the Agency has been one of the principal causes of delay of decisions on project appeals. Particularly in the Washington Office, the Forest Service has not added the staff capability to expedite decisions in the face of greater numbers of appellants availing themselves of the opportunity to appeal to the next level.

It does not appear that review at the next level is materially influencing the outcome of many appeals. The issues in most project appeals are drawn with sufficient clarity that the original appeal decision at the first level is most often upheld. At the same time, we suspect that at least some appellants are using the right of appeal to the next level as a delaying tactic in an effort to prevent projects from proceeding.

Therefore, NFPA recommends that, for appeals of individual projects, appellants be guaranteed only one level of appeal.

Appeal to the second level may be requested by appellants, but should only be accepted by the Agency when the issues raised extend beyond the region in which the appeal arises, or when there are conflicting judgments among the regions.

Additionally, the regulations at 36 CFR §211.18 should be amended to make it explicit that decisions on project appeals are final agency actions with respect to any issues of fact or law raised in the appeal. As such, the decisions should have -- and should subsequently be treated as having -- precedential value in the disposition of similar appeals (including attendant stay requests) raised in the same region or other levels of Agency jurisdiction. This change will help expedite the resolution of similar appeals by making it clear that the appeals process has an institutional and procedural memory, and is not merely an exercise in episodic decision-making.

B. The Deadlines for Each Stage of a Project-Level Appeal Should be More Tightly Drawn

Currently, the Forest Service's appeals regulations at 36 CFR §211.18 contain very few specific requirements concerning deadlines for each stage of the appeals process. Consequently, appellants are being granted extensions for filing statements of reasons without being required to make any significant showing of need. The Agency, acting through the Deciding Officer, is unilaterally granting itself additional time to file responsive statements. There is no deadline whatsoever at 36 CFR §211.18(r) governing the timing of the Reviewing Officer's actions. Moreover, there is no guidance to appellants or intervenors as to whether they have any rights to compel action in any stage of an appeal. In fact, the only strict deadline found anywhere in the appeal regulations is at 36 CFR §§211.18(c)(1) and (d) governing the filing of a notice of appeal.

It is fair to characterize the existing regulations as doing the absolute minimum with respect to setting deadlines in order to assure a reasonably expeditious appeals process. This is, in our view, a large part of the reason why decisions on project-level appeals are being unacceptably delayed.

Consequently, NFPA recommends the establishment of binding deadlines for project-level appeals. We recommend that the revised regulations require appellants to file a notice of appeal within thirty days of the date of a decision. A statement of reasons must be filed with the notice of appeal or within the next 15 days. A responsive statement must be filed within 30 days of the notice of appeal. A hearing must be requested at the time of filing the notice of appeal and must be scheduled within the next 30 days. The record shall remain open for 15 days after the filing of the responsive statement. A decision must be rendered within 30 days of the filing of the responsive statement. Intervention should be permitted at any time before the record closes, but intervenors must adhere to the above-specified time schedule.

In addition, we recommend that failure on the part of an appellant to meet the above deadlines shall be grounds for dismissal. Failure on the part of the Forest Service should normally result in the activity under appeal being enjoined until a responsive statement is filed or a decision is rendered. We recommend that the above deadlines be modified only upon, and under terms specified through, a mutual agreement among all parties including any intervenors. The 36 CFR §211.18(h) and (o) deadlines concerning stays and procedural matters, respectively, should be modified to comport with this schedule.

The above deadlines would assure that most project-level appeals are resolved within 90 days -- a reasonable goal given the nature of these types of appeals and the standard of review we recommend in Section IV(E), below. While these deadlines may appear very tight, we believe they will result in an imminently workable appeals process when combined with some of the changes suggested below.

C. The Agency Should Do a Better Job of Publicizing Project-Level Decisions to Facilitate the Achievement of Appeals Process Deadlines

One of the delay factors that often occurs with project-level appeals is that a notice of appeal is filed near the end of the filing deadline with a request for an extension of time to file a full statement of reasons. Often, the appellant asserts that he or she was unaware of the final action until well into the period for filing the notice of appeal.

A way to reduce this cause of delay involves better publicity of final Agency actions with some explanation of the tight timetables for any challenges. The forests will have to maintain more up-to-date and complete mailing lists. In addition, the Agency should, in its formal response to comments on draft forest plans, note the opportunity for inclusion on mailing lists announcing subsequent decisions to implement elements of the plan (e.g., timber sales announcements). More attention to better publicizing Agency decisions could significantly expedite the appeals process.

D. With Respect to Timber Sales, the Forest Service Should Not Offer Any Sale Until the Deadline for Filing a Notice of Appeal Has Passed, or the Appeal Has Been Resolved.

Currently, there are a number of timber sales under appeal where the sale has been offered and bid. In a few cases, sales were even awarded prior to resolving all appeals. This situation should not be allowed to continue. The Forest Service should not offer any timber sale until the time period for filing a notice of appeal has expired or until all appeals have been resolved. Additionally, the Agency should not take reporting credit until a sale is awarded.

These changes, whether included as part of the appeals regulations or as separate direction to the regions, will help minimize unnecessary conflicts over projects by avoiding the addition of another party at interest (i.e., the purchaser) to a normal appeal proceeding. As an interim measure, the Forest Service should resolve, on an expedited basis, any project-level appeal in which there is already a purchaser whose management options are being constrained by the pendency of the appeal.

E. The Forest Service Should Narrow the Standard of Review for Project-Level Appeals.

The ongoing national forest planning process and subsequent forest plan appeals are providing an exhaustive opportunity for all parties to participate in Forest Service decision-making. The plans are to be designed to comply with the requirements of the National Forest Management Act, as well as all relevant environmental statutes. For those plans completed thus far, the opportunity for comment has been extensive. The final plan decisions have been well publicized. Finally, the administrative appeals following the issuance of final plans have resulted in de novo reviews of planning decisions that involve both issues of fact and law.

In short, the planning and subsequent appeals processes have been a much more intensive exercise in public participation than anyone originally anticipated. We believe that the Forest Service is now in a position to take advantage of all this effort as a means of simplifying the appeals process for project-level decisions.

NFPA recommends that administrative appeals of individual projects carried out pursuant to a final NFMA plan with all appeals resolved be limited to a review of whether the project complies with the requirements of the plan. Such appeals should not be permitted to raise new issues of fact or law not raised during the comment period on, or appeal of, the forest plan. Appellants should have raised these sorts of issues (e.g., do the harvest prescriptions assure compliance with the Clean Water Act; will harvesting a particular site violate the Endangered Species Act; does a particular timber sale violate NFMA's suitability requirements) during their participation in the development of a plan. Only in situations where an appeal on a particular planning issue was dismissed for ripeness grounds or where appellants can establish that there have been changed circumstances or new information uncovered, should appellants be allowed to go outside of the plan in raising issues in a project appeal.

Much of the complexity and delay associated with recent project appeals has been the result of "kitchen sink" notices of appeal and the broad range of issues of law raised in these appeals. With the completion of the NFMA plans the Agency can reasonably limit this problem by adopting NFPA's proposal.

This approach will not unjustifiably restrict an appellant's ability to seek redress of such concerns. If an appellant has a demonstrable case concerning a particular project he or she is still entitled to pursue all available rights and remedies in federal District Court. Our proposal will discourage: (1) kitchen sink appeals; and (2) the use of the administrative appeals process to engage in dilatory action. Moreover, NFPA's proposal will encourage more meticulous participation in the remaining phases of the NFMA planning process.

V. THE PROCESS FOR DEALING WITH NATIONAL FOREST PLAN APPEALS SHOULD BE MODIFIED SIGNIFICANTLY. NATIONAL FOREST PLAN APPEALS SHOULD BE ADJUDICATED BY A SEPARATE APPELLATE BOARD.

The observations made in Section III above lead us to make our most dramatic suggestions for change in the area of dealing with appeals of national forest plans. Due to the problems discussed above, we believe that both the national forest planning and plan appeals processes would be best served if the latter was dealt with outside of the Forest Service.

A. NFPA Recommends That a Forest Plan Appeals Board be Created within the Office of the Secretary of Agriculture.

It is our view that the contemporary circumstances in which we find ourselves are so similar to those chronicled in the Public Land Law Review Commission's Report that the creation of a separate, Departmental appellate board for forest plan appeals has become a necessity. While these circumstances may change once the first round of plan appeals is resolved, NFPA views this change as an essential prerequisite to the successful completion of this round of national forest plans.

We recommend that a Forest Plan Appeals Board be established within the Secretary's Office to adjudicate national forest plan appeals. The composition of the Board should include individuals with both substantive and legal expertise concerning national forest planning issues.

The Board's authority should -- as with the Department of the Interior Board of Land Appeals -- be derivative from the Secretary (in this case, the Secretary of Agriculture). Board decisions should be final Agency actions unless overridden by the Secretary.

The Board should conduct a de novo review of plans under appeal. In reviewing forest plans the Board should have jurisdiction over both substantive and procedural matters. It should review, and its decisions should reach, issues of both fact and law.

NFPA also recommends that the Board dispose of forest plan appeals through somewhat more formal appellate proceedings than those presently used by the Forest Service at 36 CFR §211.18 for forest plan appeals. Specifically, the complexity of most forest plan appeals suggests the need for a required oral hearing in each action. The hearing should, in our view, be a formal adjudicatory (rather than legislative) hearing with an opportunity for cross-examination.

In addition, upon the filing of a notice of appeal of a final forest plan with the Board, the Forest Service should be required to compile the complete administrative record upon which the plan is based and transmit it to the Board, whereupon it should be made available to appellants. In the past, we have had some difficulty in both ascertaining what is in the administrative record of a forest plan under appeal, as well as obtaining elements of it. This requirement will establish, for the first time as best we can tell, a defined record for review which all parties can evaluate on an equal footing. This will correct one of the most serious and frustrating flaws in the current procedures used to resolve national forest plan appeals.

With respect to appellate jurisdiction over plan amendments or revisions, it is our recommendation that the Board retain jurisdiction over all significant amendments or revisions. The Forest Service should retain jurisdiction over nonsignificant amendments using the simplified procedures suggested in Section IV above. Any disputes over whether an amendment is significant or not, or whether a revision is warranted instead of an amendment, should be adjudicated by the Board using existing Forest Service regulations that deal with the issue. Any disputes over whether any amendment is warranted should be resolved by the Forest Service using the simplified procedures in Section IV and existing Agency regulations on this matter. Jurisdiction over disputes about the appealability of preliminary planning process decisions should be retained by the Forest Service with a right of appeal to the Board.

NFPA does not lightly make the recommendation for the establishment of a Board of Forest Plan Appeals. We appreciate that such a recommendation represents a significant departure from present procedures and the Forest Service's preferred mode of operation. It may be that the most objectionable element of the recommendation is the threat it poses to the Agency's autonomy. It is also possible, however, that combined with our recommended change in Section IV(E) above, a more exhaustive forest plan appeals process will actually increase Agency discretion at the project level in the field by reducing the number, complexity, and length of project appeals.

Be that as it may, it is our view that the Forest Service's record and progress in dealing with forest plan appeals suggests the need for significant change. The Forest Service is running a real risk that the entire appeals process will be invalidated by a Court or by Congress. It is in this context that a dramatic change is, to our thinking, unavoidable. The only question is whether the Forest Service will direct this change and make it constructive to the management of the national forests.

B. Decisions by the Board of Forest Plan Appeals Should Also be Subjected to Tight Deadlines.

By their nature, forest plan appeals will take longer to resolve than project appeals. However, they should not take forever and they should be subject to deadlines as well. NFPA recommends that forest plan appeals be bound by deadlines which are double the length of those we suggested for project appeals in Section IV(B) above. We suggest two exceptions to this general arrangement.

First, upon the filing of a notice of appeal, the Forest Service should have 30 days to compile and file the administrative record of the appeal. Appellants should then have 30 days to file an amended notice of appeal or statement of reasons. The responsive statement would then be due within 60 days of filing of the amended notice of appeal or statement of reasons. With this change, most forest plan appeals should still be resolved within 210 days.

Our second suggested exception is that the binding deadline for rendering a decision be eliminated. However, in cases where a decision is not rendered within the specified time period, the Board shall issue an order at the end of the period staying the implementation of the plan until a decision is reached. Management in the interim should continue under the old plan.

Failure on the part of appellants to meet a deadline shall be grounds for dismissal. If the Forest Service fails to meet a deadline, the Board shall issue an order staying the forest plan, and management shall continue under the old plan until the appeal proceeding is resumed.

C. The Appeals Regulations Should Include Procedures for Conducting Settlement Negotiations in Order to Assure Equitable Treatment of Parties and Take Some of the Case Load Burden Off the Board of Forest Plan Appeals.

Many plan appeals are conducive to discussions among the parties and negotiated settlements. Indeed, many such discussions are currently taking place.

However, the appeals regulations at 36 CFR §211.18 contain no guidance or procedures for conducting such discussions. Consequently, there is a substantial amount of confusion about matters such as the rights of intervenors and the types of issues amenable to settlement.

Equally important, the regulations do not specify how a settlement is to be implemented. There is no indication as to: (1) whether settlement agreements require plan amendments; (2) whether the decision to implement a settlement agreement without a plan amendment is, itself, appealable; or (3) what third parties are to do upon the signing of a settlement agreement and how much time should be allowed to execute a third party appeal of a settlement agreement. One negotiated settlement implemented without a plan amendment is under appeal. Others will surely follow.

NFPA recommends that the appeal regulations encourage parties to explore the possibility of settlement during the 30-day period in which the Forest Service is compiling the administrative record. If all parties to an individual appeal, including intervenors, agree to engage in settlement discussions, Board action shall be held in abeyance and all appeals process deadlines shall be suspended.

Parties should be required to file settlement status reports with the Board every thirty days. If any party, including intervenors, moves to terminate settlement discussions, such discussions shall be terminated and the appeals process shall resume with the deadlines for action in force.

All parties must sign the settlement agreement resolving an individual appeal. Similar appeals on the same forest plan may be consolidated for settlement purposes upon the agreement of all parties involved, including intervenors. Partial settlements, which work to narrow the issues presented for review by the Board, must also be signed by all parties.

The final forest plan shall go into effect during settlement discussion unless the parties agree to a stay. In this instance, the existing plan shall remain in effect during the pendency of the settlement discussions.

The regulations at 36 CFR §211.18 should specify a procedure for determining whether implementation of a settlement agreement requires a plan amendment. Some form of plan amendment should normally be required, and any decision not to publish a plan amendment under these circumstances should be appealable to the Agency with a right of appeal to the Board. Third parties should be provided public comment opportunity and should be afforded all rights and remedies in dealing with amendments to implement settlement agreements.

V. THE FOREST SERVICE SHOULD DO A BETTER JOB OF REPORTING THE STATUS OF FOREST PLAN AND PROJECT APPEALS.

At present, the Forest Service does not include a report on the status of the appeals process (e.g., number of appeals filed, average length of time to resolve, issues most commonly raised) in its annual report to Congress. Nor are there any reliable data on how much the appeals process is costing the Agency in terms of staff time and other expenses.

NFPA recommends that the Forest Service begin to treat the appeals process as a program with resource needs and reportable accomplishments, rather than as an afterthought. The Annual Report to Congress should contain an appeals report tracking the status of the program along the lines described above.

NFPA appreciates the opportunity to offer our views. We look forward to working with the Forest Service Appeals Task Force as it begins the process of revising the current 36 CFR §211.18 regulations.

PUBLIC TIMBER

NFPA

[illegible] CONNECTICUT AVE N.W.
[illegible]
WASHINGTON DC [illegible]

37-PUB-20
May 25, 1988

TO: Public Timber Council
National Forest Planning Committee
Federal Timber Purchasers Committee

FROM: Anne Delaney

SUBJECT: Proposed Revisions to the Forest Service Appeals Regulations

On Monday, May 16, the Forest Service published a proposed rule revising the general appeal procedures for Forest Service decisions in the Federal Register. Under the proposal, 36 CFR §211.18 would be replaced by two separate procedures, as we have recently reported. Appeals of forest plans and project decisions would be replaced by the proposed 36 CFR §217 - Requesting Review of National Forest Plans and Project Decisions. This procedure would limit appeals to one level of review, with a second discretionary level which may take no more than 30 days to complete.

The second process, for appeals of decisions related to occupancy and use of national forest system lands, is included in the proposed 36 CFR §251, Subpart C. As in §217, appeals of decisions governing written instruments would be limited to one level of review, with a discretionary 30-day second level review allowed.

A useful comparison of the specific provisions of the two proposed systems with the present appeals procedures is included in the appendix attached to the proposed rules. Therefore, a line-by-line comparison will not be provided here.

I. Time allowed to reach decisions.

For one level of appeal, the existing rule takes 155 days to complete if no extensions are granted, and the full amount of allowed time is used by each party. A second level appeal would take an additional 140 days to complete, for a total of 295 days. In the case of forest plan decisions, the first level appeal to the Chief may be followed only by a discretionary review by the Secretary of Agriculture. When the Secretary elects to review the Chief's appeal decision, there are no time limits governing the review and decision.

Under the proposed rules, the single level of review allowed under 36 CFR §217 for project decisions could take

101 days. With the discretionary second level review, the total would reach 131 days. For land management plan decisions, an additional 60 days are allowed for decisions at the first level of review, for a total of 171 days (201 days with second level review).

Under proposed rule 36 CFR §251, 140 days are allowed (with an extension permitted for filing of the Agency's responsive statement) at the first level. If the discretionary level is exercised, the total time required for resolution is 170 days.

It is important to note that, under the current rule, extensions are frequently granted throughout the appeal process, leading to much longer time requirements to resolve controversial decisions. In addition, the Forest Service often "stops the clock" to conduct negotiations with appellants and other parties. While these negotiations sometimes do lead to the successful resolution of appeals, they serve at other times to lengthen the time required to reach a decision. A more formal provision to "extend time periods for review to allow for conduct of meaningful negotiations" would still be allowed under the proposed regulations at 36 CFR §§ 251.101 and 217.17.

II. Comments needed.

A complete copy of the proposed rules is attached for your information. The Forest Service must receive comments on the proposal by July 15, 1988. While filing fees or bonding requirements are not included in the proposed rule, the Agency is requesting comments on whether a minimum filing fee should be required.

The NFPA Appeals Review Task Force, chaired by Dan Dutton, will meet in early June to begin drafting industry's comments on the proposal. If you have questions or comments on the attachments, or wish to participate on the Task Force, please call me at (202) 463-2753. We will circulate a draft copy of NFPA's comments on the proposed rule for your review prior to submitting the comments to the Forest Service.

Anne E. Delaney
Manager
Federal Forest Planning

Attachment

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 217, 228, and 251

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Forest Service is proposing to replace its current administrative appeal regulations at 36 CFR 211.18 with two distinct processes for obtaining administrative review of decisions related to National Forest System management. One rule, to be codified at 36 CFR Part 251, Subpart C, would be limited to appeal of decisions arising from the issuance, approval, or administration of written instruments authorizing occupancy and use of National Forest System lands, except contracts subject to the Contract Disputes Act, and would be available only to certain applicants for and holders of such authorizations. The second rule would be codified at 36 CFR Part 217 and would offer any citizen or organization a simplified, informal process for obtaining review of decisions relating to land and resource management planning, projects, and activities. These proposals result from review of the current rule as required by E.O. 12291 and seek to respond to the findings of that review; namely, that the agency needs to streamline, simplify, and expedite the appeals process and to eliminate the longstanding confusion of purpose and procedures contained in the current appeal regulation. The agency invites interested persons to comment on the proposals.

DATE: Comments must be received in writing by July 15, 1988.

ADDRESSES: Send written comments to F. Dale Robertson, Chief (1570), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on this proposed rulemaking in the Office of the Staff Assistant for Operations, National Forest System, Room 4211, South Building, 12th and Independence Avenue SW., Washington, DC, between the hours of 8:30 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Larry Hill, Staff Assistant for Operations, National Forest System, (202) 382-9349, or Kathryn Hauser, WO Appeals and Litigation Coordinator, National Forest System, (202) 382-9346.

SUPPLEMENTARY INFORMATION:

History of Forest Service Appeals Process

The Forest Service is charged with managing the lands and resources of the National Forest System, which today includes 156 National Forests, 19 National Grasslands and other miscellaneous land holdings totalling 191 million acres of lands in 42 States, the Virgin Islands, and Puerto Rico. Under the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528 *et seq.*) and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), these lands are managed for a variety of uses on a sustained basis to ensure a continued supply of goods and services to the American people in perpetuity.

Management decisions made by Forest Service officials in carrying out the statutory mission of the National Forest System have always been subject to a certain level of controversy and dispute depending on the type of decision made, the resources affected, and the extent to which persons believe they are affected by a decision.

For example, from the establishment of the very first national forest until the present, persons have been authorized to occupy and use the lands and resources of the National Forest System subject to the approval and oversight of Forest Service managers. The uses range from grazing livestock to conducting mining operations, from providing outfitter and guide services to National Forest visitors to obtaining ingress and egress across National Forest lands to privately owned inholdings. To obtain approval for these uses of public lands, persons have to apply for and receive written authorization or approval from the Forest Service and agree to any terms and conditions the agency feels are necessary. These authorizations sometimes give rise to disagreements between "permittees" and other authorized users and the Forest Service.

The Forest Service also issues contracts for the sale of timber from the National Forests as well as for other services. The award and administration of such contracts inevitably produces disagreements with some purchasers and contractors over contract performance.

Broader issues of National Forest resource allocation and Forest Service resource management practices also have always been a facet of National Forest management and a source of some degree of public controversy. Citizens interested in these larger issues do not share a business or legal relationship with the Forest Service as do authorized occupants, users, or contractors, but the agency has long recognized the need for citizens to have a means of questioning and objecting to agency decisions concerning National Forest management by means other than seeking remedy through the Federal courts.

There is no statutory requirement that the Forest Service provide a grievance or appeal procedure. Rather, at its own discretion and initiative, the agency, since 1906, has provided some kind of process by which grievances related to contracts and authorized uses could be heard and settled and by which the general public could challenge decisions of forest officers. In fact, for many years the appeals process was the principal mechanism the general public had to challenge forest officer's management decisions; until passage of environmental statutes in the 1960's, citizens generally had a very limited opportunity to use the Federal courts to challenge broad public land and resource management decisions.

Appeals procedures were initially set forth in Forest Service directives to its field officers through the old "use" books and later agency manuals. In 1936, the first codified Forest Service appeal regulation was promulgated (1 FR 1092; August 15, 1936). The process was very simple and allowed any one to appeal an administrative decision of a forest officer to a superior officer. The procedures applied to those who received written authorizations to occupy and use National Forest lands or who had contracts with the agency as well as to those who had a general interest in National Forest management. In the 50 plus years since that first regulation, the Forest Service has periodically revised the appeal regulations in response to changing law and policy and to its own administrative experience under the procedures existing at the time. At various times, the agency has limited appeals to those decisions involving contractors and holders of written instruments only to later revise its rules to allow appeals by anyone. The rules have provided alternatively for wholly internal administrative review and for review and adjudication by independent boards.

For example, from 1965 to 1974, rules at 36 CFR 211.20 *et seq.* (1965) provided a grievance procedure administered by a Board of Forest Appeals, an adjudicatory body separate and independent from the Forest Service. The Board reviewed appeals through several levels and with certain interaction at times with agency decisionmakers. Appellants had ultimate resort to the Secretary for a final administrative determination. The kinds of grievances covered by these rules largely concerned contractual issues raised by parties holding a permit or other written instrument with the Forest Service. Provision was made for review by Forest Service line officers of a certain type of appeal that did not involve an appellant's contractual relationship with the agency (class three), but decisions in this category made by Forest Supervisors of District Rangers were not subject to review under the rules.

Since 1965, the appeal regulation has been revised three times. Contractual appeals are now handled pursuant to the Contract Disputes Act of 1978 by an independent Department-wide Board of Contract Appeals (7 CFR Part 24). Revisions since 1965 also reflect the significant changes in environmental law that have emerged with the attendant expansion of citizens' rights to participate in Federal decisionmaking. Of special significance was passage of the National Environmental Policy Act which required agencies to consider and document the environmental impacts and consequences of proposed actions and to involve the public in its analysis and consideration of those impacts. Passage of the comprehensive National Forest Management Act in 1976 and implementation of its land management planning requirements have further increased public participation in agency decisionmaking and strengthened public awareness of the agency's activities. In response, there has been a steady increase in the number of appeals and expansion of the types of forest officers' decisions that are appealed.

The latest revision was in 1982 after the agency conducted a major review of its regulation at 36 CFR 211.19 (1977) in compliance with Executive Order 12044, the first executive order to require review of existing regulations on a 5-year cycle. As a result of that review, the agency issued a revised appeal procedure at § 211.18 (48 FR 13425, March 31, 1983), which is the current rule.

Review of the history and development of Forest Service appeal procedures reveals certain constants:

1. From its infancy, the agency has felt the need to offer some kind of process to review decisions and has perceived such reviews as beneficial and necessary for carrying out its mission of managing the National Forest System.

2. There has always been a tension about the kinds of decisions that should be appealable, especially between the procedures that are appropriate for appealing decisions affecting persons who have a business or legal relationship with the Forest Service and procedures by which the general public could appeal forest management decisions. Despite occasional changes in the rules to limit the types of decisions that can be appealed, the net effect of rule changes over time has been a steady expansion in the types of decisions that can be appealed.

3. The agency has steadfastly sought to provide an informal, simple process but has found itself establishing increasingly complex and legalistic procedures with corresponding increases in the length of time it takes to complete an appeal.

4. The agency has alternated its appeal review approach between independent boards and internal administrative review but has always found that it was more administratively confortable with managing the review process internally.

5. As the number of appeals has steadily increased over the years, the agency's need to efficiently manage the appeals process has become an increasing challenge and concern.

Finally, review of the history shows a consistent recognition by the agency that its appeal and review procedures must be periodically revised based on both public and agency experience as well as in response to changing law and circumstance.

Review of Current Appeal Process

The current regulation, 36 CFR 211.18, provides a two-level appeal process to review decisions of forest officers concerning the National Forest System. (See side-by-side comparison, Appendix A, for additional features). Some matters are excluded from appeal. Notice of decisions which are appealable is given in writing or may be provided through publication in a newspaper of general circulation depending upon the nature of the decision and who is affected by it. The rule establishes certain requirements that parties to an appeal must meet during the course of an appeal. Included are: filing procedures and related timelines; provisions for the time extensions; instructions about the preparation, content, and timing of various documents prepared during an appeal; procedures for filing and responding to stay requests; provisions for intervention by interested parties, and use of comments from other persons or organizations; procedures for oral presentations; provisions for appealing procedural matters such as stays or dismissals; and a description of the appeal record and the nature of decisions the Reviewing Officer may make. Applying timelines available under the rule, an appeal through one level of review takes about 160 days, assuming no time extensions are granted. The second level adds another 145 days, for a total of 305 days. Seldom, however, are appeals completed within these timelines.

There have been two technical amendments to the rule in the past year: one clarifying the use of postmarks to determine timely filing and one clarifying how stay requests are processed.

In accordance with USDA Department Regulation 1512-1 and E.O. 12291, the Forest Service has undertaken a review of its current appeal regulation. The review was announced in the Semi-Annual Regulatory Agenda, published April 27, 1987 (52 FR 14144).

In undertaking the review of 36 CFR 211.18, the agency did not assume that "something was broken that needed to be fixed." Instead, the agency tried to approach the review from the standpoint of objectively assessing what works well, what problems exist, and what changes, if any, could be made to maintain and strengthen the appeal process.

A team composed of Forest Service line and staff personnel from National Forests, Regional Offices, and the Washington Office was assembled to organize and conduct a Service-wide review. Specific objectives of the review were to: (1) Identify specific agency successes and problems in managing and administering the rule; (2) identify administrative impacts, including costs, of the existing rule; (3) assess how the existing rule is or is not meeting public and agency needs; (4) determine future needs for an appeals process and ways to manage it; and (5) propose solutions to problems identified.

Review Methodology

Information was sought from a broad spectrum of sources within and outside the Forest Service; special focus was given to agency performance under the existing rule. On May 20, 1987 the Forest Service issued a press release announcing the impending review and informed the public that their comments would be solicited. Additionally, a **Federal Register** notice (52 FR 22348; June 11, 1987) was published seeking public input about how well the process meets current needs and is likely to meet future needs and what people like and dislike about it. The Forest Service also issued 928 letters inviting comments to general users of the appeals process across the country including attorneys, individual citizens, environmental groups, other government agencies, Indian tribes, industry groups, and forest land users. The letter asked for their thoughts on three questions: (1) What do you perceive to be the need for an appeal process of a forest officer's decision? (2) How well does the process work for you? (3) If the process does not meet your needs, what changes do you recommend? Two hundred and thirteen responses to either the press release, Federal Register notice, or letter were received and analyzed.

To obtain information and suggestions from within the agency, two-person teams visited three Forest Service Regions: The Pacific Northwest Region (R–6), the Southwest Region (R–3), and the Northern Region (R–1). In addition, individual appeal review team members interviewed various employees in their home Regions. Approximately 160 Forest Service employees were interviewed in person at all levels of the Agency, including Regional Foresters, Forest Supervisors, District Rangers, Regional and Forest staff specialists, Washington Office and Regional Office appeal coordinators, and attorneys from the Office of General Counsel in the Washington Office and Regional Offices. Eight National Forests were formally visited by team members: Flathead NF (Montana), Beaverhead NF (Montana), Coconino NF (Arizona), Kaibab NF (Arizona), Santa Fe NF (New Mexico), Deschutes NF (Oregon), Willamette NF (Oregon), and the Mt. Hood NF (Oregon). Additionally, written comments and statistical information were sought and received from each Forest Service Region.

In the interviews, agency employees were asked to respond to a series of questions: (1) What do you want the appeal process to accomplish for the Forest Service? (2) How is your unit organized to manage appeals? (3) What are the positive or negative impacts of the appeals process on your work? Are you a better manager because of the appeals process? (4) What impediments do you see in, or as a result of, the process? (5) Do you see a difference in how appeals are processed and managed by either functional area or administrative level within the agency?

All of the internal and external comments were analyzed by the team, a summary of which is available for public inspection in the office of the Staff Assistant for Operations, National Forest System, 14th and Independence Streets SW (Room 4211), Washington, DC. The comments fell into two major categories: Those related to management concerns (how the agency manages the process) and those proposing changes in the current rule.

Review Findings and Conclusions

Finding 1—Need for an Appeals Process. The Public generally believes there is a need for an appeals process which gives an opportunity to challenge decisions that affect individuals, organizations, and communities. Furthermore, they prefer the relatively easy accessibility to decisionmakers without legal counsel afforded by the current appeal process over recourse through judicial proceedings. Nevertheless, many members of the public believe that the appeals process is cumbersome, inconvenient, expensive, too technical, and too legalistic.

Forest Service managers also believe that there is a need for an appeals process. Generally, they view it as a useful mechanism which permits line officers to review decisions that members of the public find objectionable or that they may misunderstand. In many respects, Forest Service managers' views parallel the public sentiments that the appeals process has become too complicated.

Finding 2—Objectives of the Appeals Process. The current appeals process is a "hybrid" that mixes appeals by those having grievances arising from decisions affecting business or legal relationships with appeals by others who do not have such a relationship.

An appeals process, in its most traditional sense, is adjudicatory, providing a process by which a party who has a business or legal relationship with the agency can address grievances arising from that relationship. Whether in a judicial or administrative context, a traditional appeals process provides a means for looking at what happened, judging the merits of the situation (within the defined limits of a standard of review), and prescribing a remedy.

By and large, the Forest Service appeals process has always been broader in scope than a traditional adjudicatory procedure. Increasingly, it has become a managerial tool for testing the soundness of day-to-day decisionmaking and for testing current policy and the attendant exercise of agency discretion. For the majority of appellants, the current process is more akin to a public involvement process than to an adjudicatory process, because it permits anyone dissatisfied with a decision of a forest officer an opportunity to have that decision reviewed.

While the detail and requirements of 36 CFR 211.18 have some characteristics of adjudicatory processes, it is used less as a grievance process than as a review-of-operations process. If the appeals process is to remain the latter, it need not have the formalities of a traditional adjudicatory procedure: only 15 percen of the appeals workload involves grievances arising from a business or legal relationship with the Forest Service. If the appeals process is to be an adjudicatory process, it can be limited to those with a permit or other authorization to occupy and use National Forest lands, since the agen provides the general public other foru for influencing agency decisionmaking

Finding 3—Workload and Associat Impacts. Actual time and resources devoted to appeals have increased dramatically in the past few years. Costs of managing the appeals process are growing rapidly each year. As land management planning and project implementation proceed, this trend is definitely on the upswing as shown in the following table.

TABLE 1.—NUMBER OF APPEALS

Fiscal year	Washington office	Ser-vicewi
1980	225	
1981	139	
1982	303	
1983	310	5
1984	147	4
1985	247	5
1986	413	10
1987	335	8
1988 (midyear)	234	8

[1] No record.

While it is apparent that the number of appeals has fluctuated quite a bit, t workload has steadily increased. The fluctuating patterns result from controversial activities undertaken Servicewide in a given year or the previous one. In 1979 and 1980, for instance, it was the second Roadless Area Review and Evaluation; in 1982 and 1983, it was the Small Business Timber Sale Set Aside program; in 19 it was the setting of fees for recreation residence permits; and in 1986 it was t beginning of approval of Forest plans mandated by the National Forest Management Act of 1976. Fewer Fores plans were approved during FY 198 accounting, in part, for fewer appeals this past year than in FY 1986. Appea doubled between 1985 and 1986, and about half of the increase resulted fro appeals of decisions to approve Forest plans.

The process is costly as shown in th following data in Table 2:

TABLE 2.—COST SUMMARIES BY FISCAL YEAR, BY ADMINISTRATIVE LEVELS

Fiscal Year	Grand total	Administrative levels			Washington Office [1]
		Ranger District	Supervisor's Office	Regional Office	
1984	$2,791,229	$472,323	$791,524	$1,211,316	$406,066 (LMP $80,726)
1985	2,833,965	482,294	783,434	974,435	473,842 (LMP $101,481)
1986	5,298,320	706,480	2,034,208	1,907,530	650,102 (LMP $161,451)
1987 [2]	5,311,585	466,117	2,056,035	1,843,757	945,676 (LMP $511,262)
Total	16,025,129	2,127,204	5,495,281	5,937,038	2,475,686 (LMP $854,920)

[1] Figures in parentheses are the share of total Washington Office costs attributable to Land and Resource Management Plan appeals (LMP). Similar breakdowns were not available from Regional or Forest levels.

[2] Data as of 7/1/87, projected through 9/30/87.

The total $16 million dollar price tag to administer appeals (1984–1987) are direct costs only that are attributable to agency staff work.

The process is also time-consuming for all concerned. The current rule provides a duration of about 160 days to decide an appeal through one level of review (assuming there are no time extensions and/or intervention requests granted, and there are no procedural appeals), and 305 days if taken through the second level. On the average, it has taken 225 days, or 7.5 months to decide an appeal at the first level.

Finding 4—Redundancy. A case can be made that some of the reasons for having an appeals process have been legislated into obsolescence by such statutes as the National Environmental Policy Act and National Forest Management Act. Decisions that have been thoroughly analyzed, documented, and subjected to public participation under provisions of these statutes are habitually recycled through the appeals process, giving the public, as it were, redundant opportunities to object to a single decision. The issue is "how many hurdles must be cleared before management decisions may be implemented?"

Sixty percent of all appellants have been involved in some aspect of predecisional public involvement activities; and 60 percent of the time, the issues under appeal involve processes carried out pursuant to the National Environmental Policy Act and the National Forest Management Act.

Finding 5—Communications. Many appeals result from misunderstandings and communication failures between Deciding Officers and affected groups or individuals. There is a general reluctance for the parties to try to resolve problems before an appeal is filed.

Finding 6—Impacts on Projects. The agency's ability to design and implement resource management projects and activities is hampered when agency resources are siphoned from resource management to process management. For example, an appellant can, at minimal cost, increase the cost (and sometimes substantially diminish the feasibility) of a project through the time it takes the agency to complete an appeal, even though the original decision might ultimately be upheld. Where the agency has solicited bids or proposals for special uses on National Forest System lands, such as for winter sports areas, applicants can spend substantial amounts of money responding to the proposals only to incur greater expense, because of the time involved to process the appeal. The process can also be abused by using appeals of procedural rulings as a delay strategy.

Twenty-two percent of the appellants who appeal decisions to adopt Forest plans also appeal later decisions by forest officers to implement project activities permitted under these same plans. More often than not requests for stays accompany appeals of project decisions.

Finding 7—Process Management. Among the many concerns with proper functioning of the current appeals system are that the agency itself does not follow its own rules with respect to time periods and that there is too much paperwork. While supporting the need for an appeal process, the public wants one that is easier to use. Additionally, most believe the current process is biased, because it is an internal review, and that there is a double standard where timelines are concerned.

While the Forest Service does not agree that there is a serious bias problem, it recognizes that, by virtue of its being an internal review process, some citizens will always perceive bias and will further infer bias from appeal decision history. Reviewing Officers affirm about 70 percent of all appeal decisions, and reverse or remand (return to the lower level for specific action, upon which a new appeal could be based) only about 15 percent; and either dismiss (for procedural inadequacies) or close the other 15 percent when the appeal is withdrawn by the appellant, or the initial decision is withdrawn by the forest officer.

Appellants are also quick to point out that while the agency insists that appellants observe rule timelines, it does not consistently do so itself: The average time for forest officers to complete certain tasks (responsive statements, intervention and stay rulings, and final ruling on the merits) is typically longer than permitted under the rule, especially for complex appeals involving land management plans.

Summary of Review Findings

The often-voiced ideal of the appeals process has been to give the public an informal avenue for review and resolution of disputed agency decisions without the necessity of litigation. The process has served the agency and the public with varying degrees of success for many years. But viability of the appeals process has suffered as multiple use management of the National Forests continues to grow in complexity, and the magnitude and intensity of issues expands.

The process, as it has evolved over the last few years, is not the simple, quick, informal process that the agency originally intended it to be. In fact, the appeals process has become a significant generator of paperwork and a time-consuming, costly effort, trading off resources and energies that might otherwise be directed to substantive on-the-ground land and resource management activities.

The Forest Service "appeals" process needs adjustment to better serve the public and the agency and to be compatible with the agency's public-oriented vision statement of "caring for the land and serving people." Practice under the current rule does neither as well as it might.

Options Considered

In considering the findings of the review, the Forest Service formulated a number of alternatives:

1. Retain the current appeal regulation without change.

2. Revise the current regulation to address some of the major problems discovered in the review process, such as removing delays inherent in handling procedural matters; modifying time periods; streamlining the overall process.

3. Devise a new appeal process that imposes few procedural requirements, is informal, limits paperwork only to existing documents and appellant's notice of appeal, limits participation to appellants, and requires a Deciding Officer to meet with appellants to discuss and resolve concerns.

4. Adopt a highly legalistic process compared to that of the current rule. This option, a grievance style procedure, would, for example, require appellants to meet standing requirements and post bonds to protect the public interest from nuisance-type appeals, allow no extensions of time for the agency or appellants, and require appellants to pay agency costs if appellants do not prevail.

5. Provide a two-track appeal procedure; an adjudicatory one for appeals involving written instruments, and a simplified procedure for decisions that involve agency discretion.

6. Establish an external, independent review board, members of which would be appointed by the Secretary to deal with all appealable decisions or certain classes of decisions.

7. Eliminate the appeal process altogether.

Each option was analyzed in terms of the findings of the review and the agency's objectives in having an appeal process. The conclusions were as follows:

1. While agency personnel and appellants are knowledgeable of the current rule and thus have a certain "comfort level" with its procedures, retaining the current rule without change would ignore the review findings.

2. Trying to fix the current rule would not be sufficient to address the findings and would further "hybridize" the appeals process, continuing the "split personality" of the current rule which blurs a grievance type appeal process with more a discretionary type review process.

3. A rule with few procedural requirements saves effort expended by the agency in time-consuming procedural matters. Savings in time and dollar costs to manage the appeals process could be applied to on-the-ground management of land and resources. However, those appellants who have a legal relationship with the Forest Service through a written instrument or authorization would be short-changed by a new appeal process that provides few procedural or "due process" requirements.

4. Adopting more legalistic procedures similar to those in judicial proceedings is less likely to serve the interests of appellants and the Agency. However, requiring appellants to pay a filing fee may have merit. Such suggestions have been rejected in previous appeal regulations. Filing fees are not included in the proposed rules, but are a recurring topic, so the Agency invites public comment on whether a reasonable minimum filing fee should be required.

5. On the surface, establishing an independent board to hear and rule on appeals might appear to be attractive from the standpoint of obtaining more objective, unbiased decisions. However, the history and nature of such boards is that they require highly structured, formalized rules of procedure which complicate, rather than simplify, an appeals process. Such complexity is not in the best interest of those appellants who lack the resources to hire legal representation. Moreover, such formalized processes may intensify adversarial relationships with the agency whose decisions are being reviewed and ruled on. Such a relationship is counter to the Forest Service commitment and desire to increase communication and cooperation with the public. In addition, an external board could erode the agency's statutory authority to administer its programs and to supervise, correct, or redirect operations.

6. The option of eliminating the current rule and not offering any kind of appeal process ignores the finding that the public and the agency want a process that allows for review of decisions. The agency values an administrative process, because it requires the agency to continue to work with and hear what appellants are saying and objecting to. This active listening, which is quite different from the adversarial relationships of judicial proceedings, allows the agency to correct improper decisions and operational problems. It offers the public a chance to get decisions reversed without the expense of a legal proceeding. Moreover, even though the agency provides an appeal process at its own discretion, because a process has been offered for so long, the public would likely view its elimination as a serious loss.

Based on analysis and consideration of the findings resulting from review of the current appeals process, the Forest Service concludes that the time has come to propose a significant redefinition and redirection of the appeal process. The alternative that appeared to have the most merit was that of developing a two track system (No. 5)—one for appeal of written instruments and one for review of land and resource management planning and project implementation decisions, in which the agency has substantial discretion. This approach would allow adoption of procedures appropriate to review of each type of decision and would eliminate the confusion of purpose and procedure endemic to the current rule. Moreover, this approach allows for responding to the other findings of the review related to simplifying and streamlining the process.

Proposal

The current approach of treating all decisions alike and subjecting appeals and reviews of all decisions to the same procedural requirements under 36 CFR 211.18 confuses the need to provide a grievance procedure with both the agency's need to review its own decisionmaking conduct and the agency's desire to provide full opportunity for the public to participate in and affect Forest Service planning decisions. It is clear that the agency needs to separate those purposes and devise decision review procedures that are appropriate to each. Accordingly, the agency is proposing to replace the current appeal rules with two rules, each being a separate and distinct process for challenging and obtaining review of Forest Service decisions. The distinction is based on the types of decisions at issue and the degree of agency discretion in making the decision. These factors, in turn, determine who is affected by a decision, the type of relationship that exists between the agency and appellants, and the procedures that are appropriate for obtaining review of a decision.

One rule would be limited to appeal of written decisions arising from issuance.

approval, and administration of written instruments authorizing occupancy and use of National Forest System lands. This rule would be codified at 36 CFR Part 251—Land Uses as Subpart C. Appeals under these rules would be limited to holders of and certain applicants for authorizations who enjoy a business or legal relationship with the Forest Service based on the agency granting a privilege authorized by statute to use and occupy National Forest System lands. This process is somewhat adjudicatory in nature, as the remedy for the dispute resides within or may be interpreted from the written instrument itself or an authorizing statute or regulation. As previously noted, contractual disputes would not be subject to this rule. Those kinds of disputes would continue to be handled by the Department's Board of Contract Appeals pursuant to the Contract Disputes Act and 7 CFR Part 24.

This written instrument rule would retain many of the features of the current rule (§ 211.18) and seek to offer a fair and deliberate process for appealing and obtaining administrative review. In short, it would provide the elements of due process that are fundamental to resolving issues that arise from a business or legal relationship between the Forest Service and the appellant.

In contrast to the structured, grievance-oriented rules for decisions related to written instruments, the agency is proposing a more informal review process, to be codified at 36 CFR Part 217, for National Forest System land and resource management plan and project decisions. These proposed rules would offer anyone who objects to such decisions, a streamlined, one-level review by an officer at the next administrative level. The decisions reviewable under Part 217 arise from compliance with the National Environmental Policy Act, the National Forest Management Act, implementing regulations, policies, and procedures and represent the public's last administrative opportunity to influence the outcome of National Forest System planning and decisionmaking.

The procedures set forth in each rule have been drafted to conform to and reflect other findings of the review, namely (1) to simplify the process to make it less costly to administer and easier to use; and (2) to give greater emphasis to discussions between the Forest Service Deciding Officer and potential appellants to avoid appeals and to work cooperatively to resolve issues where possible. Accordingly, many of the feature in one rule are included in the other, where not inconsistent with the basic purpose of each rule.

It should be noted that regardless of the nature and degree of any changes to the appeals process through rulemaking, the agency recognizes that it must improve its internal management of the process itself. This will require strengthening the management review of appeals and monitoring of the process Servicewide. If these proposals are adopted, special emphasis will be given to monitoring how well Deciding Officers and Reviewing Officers meet deadlines under the new rules, and prompt action will be taken to remedy excessive delays in Forest Service processing of appeals.

Features of Proposed Rules

Part 251, Subpart C—Appeal of Decisions Related to Occupancy and Use of National Forest System Lands

The rules establishing procedures for appealing decisions related to written instruments issued or approved by the Forest Service would be codified at Part 251—Land Uses. This placement strengthens the logical tie between the primary rules that govern land use authorizations and the procedures for challenging Forest Service decisions about authorizations.

The principal features of the proposed rule keyed to the CFR section number are summarized here.

Section 251.80 Purpose and scope. This section asserts that the purpose is to provide a fair and deliberate process for appealing and reviewing written decisions arising from the issuance, approval, and administration of written instruments that authorize the occupancy and use of National Forest System lands.

Section 251.81 Applicability and effective date. Unless those who can appeal under these rules elect to have a decision reviewed under 36 CFR Part 217, the rules at 36 CFR Part 251, Subpart C, would govern all appeals related to authorized uses of National Forest System lands. This section would allow for the continuance of appeals related to written instruments that have already been brought under the current rule 36 CFR 211.18.

Section 251.83 Parties eligible to participate. There would be only three types of parties participating under this subpart: Appellants, intervenors, and the Deciding Officer who made the decision being appealed. Appellants would be limited to a holder of a written instrument or authorization or to applicants who are applying for an authorization in response to a solicitation by the Forest Service and who either are denied the authorization or object to terms and conditions being offered. The persons allowed to intervene would be other applicants for the same authorization or holders of similar authorizations who have a direct interest and could be directly impacted by the appeal decision.

The limitations on who can appeal and intervene are essential to this proposed rule, because it is designed only to resolve issues arising from a decision to issue or approve, to deny issuance or approval, or to administer an authorization. These persons have a business or legal relationship with the Forest Service by virtue of the application for or acceptance of a written instrument and because of that relationship must have a procedure for bringing and resolving grievances.

Those who object to the use of the lands or resources to be covered by the issuance of an authorization could request review of the basic decision on the management and allocation of the area under the new procedures at 36 CFR Part 217 at the time the basic land management allocation, prescription, or project decision was made. For example, if the Forest Service wants to consider developing a winter sports site on a National Forest, that allocation must be subjected to analysis in accordance with the National Environmental Policy Act and implementing regulations, policies, and procedures in both the land and resource management plan and a later site-specific project proposal. In both circumstances, the results of that analysis would be documented in either an environmental assessment, or, more likely, an environmental impact statement, and the decision would be made and documented in a Decision Notice or a Record of Decision. It is at these points that interested persons could object to the decision under 36 CFR Part 217. If the Deciding Officer decided to establish and develop a winter sports site and the period for requesting review of that decision expired, or the decision was upheld by a Reviewing Officer, the Deciding Officer would solicit applicants to develop the site. When the Deciding Officer chose the best applicant and offered a permit, a business or legal relationship would then exist, which would not be subject to intervention by the general public through 36 CFR Part 217 or Part 251.

This distinction between the public's opportunity to object to a basic allocation decision or site-specific project implementation decision and the right of an applicant or permit holder to enter into a business or legal relationship with the Forest Service is fundamental to the construction of the two rule process.

Section 251.84 Appealable decisions. This section lists the written decisions arising from specific types of permitted uses of National Forest System lands that can be appealed. The decisions range from approval of grazing of livestock to approvals of special use permits. The approval of plans of mining operations pursuant to 36 CFR Part 228 and 36 CFR 292.17 and 292.18 would be added to the list of appealable decisions, ending the separate abbreviated appeal procedures of 36 CFR 228.14. The new procedures to be established in Part 251 Subpart C are so similar to those now offered under § 228.14 that the agency finds it would be redundant and inefficient to retain a separate procedure for appeal decisions related to mining operating plans.

Paragraph (b) clarifies that decisions made by a forest officer who is not a line officer are considered to be decisions of the line officers. Questions on this have arisen from time to time under the existing rule and have confused some Forest Service officers and appellants as to where an appeal should be filed. This paragraph would eliminate that confusion especially in conjunction with the requirements of paragraph (c) regarding giving notice of a decision.

Paragraph (c) of this section would continue the requirement that the Deciding Officer give applicants and holders written notice of a decision; in most cases, this is a letter. The proposed rule would add a new requirement that the notice specify the name of the officer to whom an appeal may be filed and the deadline and address for filing. Equally important, the rule would require a Deciding Officer to include a statement that the Officer is willing to meet with the applicant or holder to hear and discuss any concerns or issues related to the decision. This requirement reflects the agency's desire to strengthen direct communication between forest officers and users and, in so doing, to foster a climate in which issues can be resolved without leading to an appeal. Such a statement has not been required in previous appeal rules and is proposed to emphasize and signal to Forest Service employees the importance of talking and meeting with National Forest users rather than relying principally on written communication.

Section 251.85 Decisions not appealable under this subpart. This section excludes from appeal the same decisions that are currently excluded under 36 CFR 211.18. In addition, it updates the list of excluded decisions to reflect the enforcement of Uniform Rules for Protection of Archaeological Resources at 36 CFR Part 296, which requires imposing civil penalties for violations covered by those rules, and to reflect enforcement of prohibitions and orders related to National Forest System administration at 36 CFR Part 261. In addition, as a result of the agency's experience with the devastating forest fire season of 1987, the rule would now exclude decisions related to rehabilitation of National Forest System lands resulting from natural catastrophes, if the Regional Forester or Chief finds and gives notice in the **Federal Register** that good cause exists for excluding such decisions from appeal. Also excluded from review under this rule would be decisions only reviewable under the new process proposed for 36 CFR Part 217.

Section 251.86 Election of appropriate review procedure. Because the agency is also proposing another decision review process at Part 217, it is possible that a decision might occasionally be appealable under Subpart C of Part 251 as well as reviewable under Part 217. For administrative efficiency, in such cases, the same appellant would not be allowed to pursue review of a decision simultaneously, or sequentially, under both processes. This section, therefore, covers that possibility, by requiring the appellant to choose the appropriate review process, and further advises that an appellant thereby forfeits all right to use the other process for that same decision. It should be noted that only a permit holder or applicant is ever faced with this choice. The need to choose the appropriate review procedure would arise only when a decision documented in a Decision Memo, Decision Notice, or Record of Decision affected an appellant's business or legal relationship with the agency.

Section 251.87 Levels of review available. This section would entitle appellants to only one level of review for decisions made by field officers in contrast to the two levels of review currently provided in 36 CFR 211.18. Limiting review to only one level responds to *the* findings and conclusions that the current process takes too long. The agency believes that the nature of decisions relating to written instruments are of such specificity and detail and so constrained by authorizing statute or regulation that two levels of review is normally excessive. However, the rule would permit discretionary review of appeal decisions by the next higher officer. It would require each Reviewing Officer to immediately forward an appeal decision letter to the higher officer so that officer could decide whether or not to review the lower level appeal decision. This discretion provides an internal control mechanism over appeal decisions.

As in the current rule, initial decisions by the Chief of the Forest Service would be subject to discretionary review by the Secretary of Agriculture, but a holder or applicant is not entitled to this review. This longstanding difference in treatment of appeal of initial decisions by the Chief reflects the differing scope and nature of decisions made by an Agency head. It also reflects the practical reality that automatic review of all decisions by the Chief is inconsistent with the scope of work and responsibility assigned to the Secretary of Agriculture.

Section 251.88 Filing procedures and timeliness. The procedures in this section are the same as in the current rule, except for two differences. Under the current rule, the notice of appeal is filed with the Deciding Officer. Under the proposed rule, an appellant would file an appeal with the Reviewing Officer. The filing period would remain 45 days, but the language of the proposed rule is clarified to specify that the period would end 45 days from the date *on* the written notice of the decision. The rule would make clear that it is the responsibility of the appellant to file the notice properly and by the end of the filing period. The rule would retain legible postmarks as evidence of timely filing in event of question.

Section 251.89 Extension of time. Except for time to file a notice of appeal and for discretionary reviews of appeal decisions, a Reviewing Officer has the discretion to extend the time periods under the rule at the request of appellants, intervenors, and the Deciding Officer, or to extend the time for issuing the appeal decision. These procedures are the same as in the current rule. While the agency seeks to be responsive to concerns about the length of time appeals take, it is impractical not to allow extensions of time where needed. Through strengthened management of the appeals process, the agency intends to give renewed emphasis to meeting deadlines in the rule and to avoiding extensions of time as much as possible.

Section 251.90 Notice of appeal content. In contrast to the current rule, the requirements for notice of appeal content in the proposed rule are very specific. The detailed list of information that is to be provided is necessary to inform appellants of the evidence and argument they must present in order for the Reviewing Officer to review the appealed decision. In fact, the proposed rule makes clear that appellants bear the burden of proving in their notice of appeal why a decision should be changed.

Section 251.91 Responsive statement. It is fundamental to due process that all parties be apprised of information submitted to the record and provided an opportunity to reply to the information. Therefore, the proposed rule retains the features of the current rule with regard to responsive statements.

The proposed rule requires a Deciding Officer to prepare, within 30 days of receipt of the notice of appeal, a statement responding to the facts, or issues of law or regulation alleged by an appellant. A copy must also be sent to the appellant and any intervenors, and they, in turn, may submit a reply to the responsive statement to the Reviewing Officer.

Section 251.92 Implementation and request for stay of implementation. Like the current rule, the proposed rule would allow implementation of a decision under appeal unless a stay is requested and granted. The proposed rule would permit an appellant or intervenor to request a stay at any time if the harmful effects could occur during pendency of the appeal.

This section incorporates most of the content requirements of paragraph (h) of the existing rule for requesting a stay. The proposed rule permits other parties to the appeal to reply to a stay request and requires that if they do so, they must send copies to all other parties to the appeal.

This section departs from the existing stay procedures of 36 CFR 211.18 by requiring a stay to remain in effect for the 15 days past the period for deciding whether to conduct a discretionary review of the appeal decision, unless changed or lifted by the first-level Reviewing Officer. The rule would also allow the Reviewing Officer at the discretionary level on his or her own initiative to extend a stay in whole or in part and to change or lift a stay, as well as to accept petitions to change or lift a stay. This approach is consistent with the objective of streamlining the appeals process at the discretionary level which was discussed under the comments on § 251.87.

Section 251.93 Ruling on stay requests. Under the proposed rule, the Reviewing Officer would have to rule on a stay request within 10 calendar days from receipt; the current rule § 211.18(h)(4) allows 21 days. This reduction in the time for ruling on stays is responsive to the findings of the review of the current rule that the current appeals process takes too long. The criteria the Reviewing Officer shall consider in ruling on a stay request are the same in the proposed rule as in § 211.18(h)(5), except that the additional criterion has been added to consider any information provided by the Deciding Officer or other parties to the appeal in response to the stay request. As in the current rule, the proposed rule requires the Reviewing Officer to issue a written decision on a stay request and specifies the content of the stay decision letter, depending on the decision.

Section 251.94 Duration of and changes to stay decisions. The rules in this section are basically the same as paragraph (i) of the current rule except that—consistent with the desire to streamline and expedite appeals and with a one level of appeal process—decisions to grant, deny, lift, or otherwise change a stay are not subject to further appeal and review.

Section 251.95 Intervention. Because the proposed rule is limited to those persons who have a business or business or legal relationship with the Forest Service, it is appropriate and necessary to limit the basis for intervention in an appeal under the proposed rule. Therefore, under the proposed rule, interventions would be limited to applicants for or holders of a written instrument of the same or a similar type that is the subject of the appeal and who have an interest that could be directly affected by an appeal decision. For example, where a grazing permittee appeals a decision arising from administration of a grazing permit, a holder of a grazing permit on a neighboring allotment might also be affected by the appeal decision and wish to intervene in the appeal to protect his or her interests.

Those requesting intervention would have to make written petition to intervene and bear the burden of showing in the petition how a decision on the appeal would directly affect the petitioner's interests. The Reviewing Officer would determine if a person qualified to intervene and that decision would not be subject to further appeal.

The rule would require appellants and intervenors to furnish copies of all submissions to each other and the Deciding Officer.

In contrast to the current rule, intervenors would not be able to continue an appeal if the appellant withdraws the appeal. The failure to provide such a control in the current rule has led to many cases where the intervenors get an appeal decision after an appellant withdraws. Since the intervenor would not be a party to an appeal unless the appellant had appealed, it is only logical that there be no further standing for an intervenor on issues mooted by withdrawals.

Section 251.96 Oral presentations. In contrast to the current rule, this proposed rule would clarify that the purpose of oral presentations is to restate, emphasize, or clarify information related to an appeal. The rule would also clarify that these presentations, which can be meetings in person or by phone, are informal affairs. Rules of procedure and conduct applicable to a judicial proceeding, such as rules of evidence or cross-examination of participants, are inappropriate.

Consistent with the effort to streamline and simplify the appeals process and with the basic concept of this proposed rule, only appellants could request oral presentations. However, intervenors and the Deciding Officer would be entitled to participate, and the presentation could be open to public attendance, but not participation.

A request for an oral presentation at the time of filing an appeal would automatically be granted. Requests for oral presentation later in the appeal would be considered, but the Reviewing Officer would have discretion to grant or deny the request, and that decision would be final and not subject to further appeal.

The rule would make clear that appellants and intervenors must bear any expense in attending an oral presentation.

Section 251.97 Authority of reviewing officer in conduct of appeal. This section would authorize the Reviewing Officer to establish whatever procedures are necessary to ensure orderly, expeditious, and fair conduct of an appeal. Such procedural matters would not be subject to appeal and further review. This section retains the provision of the current rule allowing a Reviewing Officer to consolidate appeals of the same decision or similar decision involving common issues of fact or law and to issue an appeal decision covering these appeals. The Reviewing Officer must give notice to all parties of a decision to consolidate multiple appeals.

The proposed rule also makes clear that the Reviewing Officer at the first level may ask for additional information from any party to an appeal, but all parties must be notified of the request and receive copies of any information supplied.

Finally, in contrast to the current rule, this section would make clear that an appeal of an initial decision by the Chief conducted by the Secretary would be subject to the same rules and procedures applicable to all other first level appeals. This section also addresses procedures applicable to conduct of discretionary reviews.

Section 251.98 Appeal record. This section defines what constitutes the appeal record at both the first level of review and at the discretionary levels of review. In contrast to the existing rule at § 211.18, the responsibility for assembling and maintaining the appeal record would reside with the Reviewing Officer. This eliminates an occasionally expressed concern of appellants that it appears to be a conflict of interest for the Deciding Officer to maintain the record.

In the interest of expediting and streamlining the appeal process, a Reviewing Officer, who exercises the discretion to review a lower-level Reviewing Officer's appeal decision, would be limited to the record assembled at the first level and the appeal decision letter of the lower level Reviewing Officer. The rule expressly prohibits reopening the record at this discretionary review level. This prohibition does not apply to review by the Secretary of initial decisions of the Chief, since the Secretary's review would be the first and only level of review of those decisions.

Section 251.99 Appeal decision. This section of the proposed rule provides greater specificity to Reviewing Officers than the current rule on the nature of the decision to be rendered and continues the 30-day timeframe from closure of the appeal record for rendering appeal decisions. This section also would clarify that unless an appeal decision is reviewed at the next level, the Reviewing Officer's decision stands as the final administrative decision of the Department of Agriculture on the matter.

This section also includes a new provision aimed at reducing the time it takes to complete appeals and ending the uncertainty of the status of appeals when a decision is not rendered within 30 days by a Reviewing Officer at the discretionary level of review. Under the proposal, when a discretionary review of an appeal decision is not completed by the end of the 30-day period, the discretionary review is automatically terminated and the appeal decision of the lower level reviewing officer stands as the final administrative decision of the Department. The rule would also require notice to appellants in this event, bringing a much-needed management control to the appeals process. This 30-day limit on discretionary review responds directly to the public criticism that emerged during review of the existing rule; namely, that the Forest Service holds appellants and intervenors to strict compliance with timeframes but often does not itself comply with the timeframes established in the rule. A survey of appeals case workloads shows that second-level reviews (including discretionary reviews) result in the longest delays in rendering appeal decisions. Thus, this proposal to tighten the time period for issuance of discretionary appeal decisions should be an effective remedy. Since oral presentations, intervention, and reopening of the record will not be features of discretionary reviews, the 30-day period should be sufficient for completing reviews.

Section 251.100 Dismissal without decision. This section makes more explicit the various circumstances that will result in the dismissal of an appeal without a decision on the merits. There are several changes from the current dismissal rules under 36 CFR 211.18, namely:

1. The rule would now explicitly require the Reviewing Officer to give written notice of dismissal and include an explanation of why the appeal is dismissed. While this has been a standard Forest Service practice, the requirement is not in the current rule.

2. Dismissal for the reasons cited in this section is now mandatory; the discretion previously granted to the Reviewing Officer is removed. A uniform approach is required to ensure consistent rulings Servicewide by Reviewing Officers.

3. A decision to dismiss for any of the reasons cited would not be subject to further appeal or review. This limitation is consistent with the single level of review provided by the rules and also consistent with the overall objective of simplifying the procedural complexity of the appeals process where possible.

4. Withdrawal of a decision by a Deciding Officer would result in automatic dismissal of an appeal because such action moots the appeal.

Section 251.101 Resolution of issues by means other than appeal. This section states a new requirement that, whenever practicable and consistent with the public interest, Deciding Officers shall consult and meet, preferably in person, with holders of written instruments prior to issuing written decisions. The agency believes that direct communication can lead to better working relationships with holders and that, where the holders and Deciding Officer meet and discuss the issues arising from administration of the written instrument, may appeal situations can be avoided altogether.

This prior communication requirement would not apply to applicants eligible to appeal under this subpart because of the competitive nature of such applications and the possible appearance of improper conduct by the Deciding Officer, if he or she were to discuss an application with only some applicants.

The rule clarifies a point of some confusion under the existing rule, namely that the Deciding Officer has authority to discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree in facts, and explore opportunites for resolving the issue by means other than appeal. Again the emphasis is on direct communication between agency personnel and holders and on arriving at mutual agreements rather than emphasizing the adversarial approach of an appeals process.

Finally, this section retains the provision of the current rule that a Deciding Officer may withdraw a decision, in whole or in part. The ability to modify a decision is essential to the concept and emphasis in the proposed rule of trying to resolve issues even while an appeal is underway.

Section 251.102 Judicial proceedings. This section would declare and give notice to appellants of the longstanding policy that, in any filing for judicial review and relief from a decision appealable under this subpart, the Department of Agriculture will argue that such an action is premature and inappropriate unless the appellant has first sought to resolve the dispute by invoking and exhausting the appeal procedures.

Part 217—Requesting Review of National Forest Planning and Project Decisions

The rules establishing procedures for requesting review of plan and project decisions on National Forests would be codified at 36 CFR Part 217. This placement creates a logical tie between the public participation opportunities provided in Part 216, which set forth procedures for involving the public in formulation of agency directives, and Part 219, which governs land and resource management planning.

Reviewers will note that the rules proposed for Part 217 use different terminology than that in the proposed rule for written instruments. Under Part 217, there are no "appeals," "appellants," or "appeal records"; instead there are "requests for review," "requesters," and "review files." The differing terms are a conscious effort to reflect the more informal review process under Part 217 and to emphasize the fundamental distinctions between appeals under 36 CFR Part 251, Subpart

C and requests to review decisions under Part 217. The proposed written instrument rule is built on the fact that there is a business or legal relationship with the Forest Service and there needs to be a procedure to decide disputes that arise from that relationship. The review process envisioned in Part 217 recognizes that requesters do not have a direct business or legal interest but are concerned with broader issues of how the Forest Service exercises its discretion in managing the National Forest System.

As previously noted, the agency views the decision review process proposed for Part 217 as the public's last administrative opportunity to influence the outcome of National Forest System planning and decisionmaking. In offering this review process, however, the Forest Service wants to make clear that it believes better resource decisions and fewer challenges of those decisions will result, if interested citizens and organizations become involved early in the planning and decisionmaking process. Therefore, the agency encourages those interested in National Forest System Management to take advantage of the opportunity to "get in on the ground floor" of planning.

Despite increased emphasis on informing the public of prospective activities and decisions, local forest officers cannot possibly know and identify all the persons or organizations that might have an interest in a particular activity or class of activity. Therefore, of necessity, those interested in National Forest management need to take some responsibility for keeping themselves informed, if they want to have a meaningful opportunity to participate in the decisionmaking process at the earliest stages. For example, all National Forests keep some kind of schedule of planned activities, and many of those schedules are published in local newspapers. Moreover, any citizen or organization can call or write a District Ranger or Forest Supervisor to inquire about upcoming activities and decisions and to request that they be notified when the scoping on the proposed project or activity begins.

The Forest Service is committed to fostering a public participation climate that allows for the open expression of ideas and that encourages the public to join with the agency in identifying and analyzing natural resource management alternatives that balance present and future resource needs and objectives. The agency believes the public interest is far better served by mutual effort to resolve differences *during* the decisionmaking process than by trying to resolve those differences *after* a decision is made.

The informal review process proposed for Part 217 reponds to the majority of those who provided comments during the review of 36 CFR 211.18, who said they wanted a process that is easier to use, takes less time, and is readily available. Therefore, exchange of documents among participants, intervention, oral presentations, and other "legalistic" features of the current rule are not proposed as a part of the Part 217 review process.

Other principal features of the proposed rule keyed to the CFR section number are summarized here.

Section 217.1 Purpose and scope. This section asserts that the purpose of the rule is to provide an informal review process for persons interested in National Forest management to challenge certain planned or proposed actions and to have the challenge reviewed quickly by an official at the next level. The rule further asserts that the process is not adjudicatory and, therefore, establishes a minimum of procedures to guide the review process.

Section 217.2 Applicability and effective date. Unless those who can also appeal under 36 CFR Part 251, Subpart C, elect to appeal a decision under 36 CFR Part 251, Subpart C, the rules at 36 CFR Part 217 would govern all reviews related to planning and project decisions on National Forest System lands. This section would allow for the continuance of appeals that have already been brought under the current rule 36 CFR 211.18.

Section 217.3 Definitions. It should be noted that a new type of decision document, a "Decision Memo," is defined in this proposed rule. A "Decision Memo" is a concise memorandum to the files signed by the Deciding Officer that records a decision to implement an action that has been excluded from documenttion in an environmental assessment or environmental impact statement. Separate notice on this new term and procedures governing preparation and giving notice of such decisions will be published in the **Federal Register** soon as part of a larger revision of policies and procedures for compliance with the National Environmental Policy Act.

Section 217.4 Eligible participants. The current appeal rule at 36 CFR 211.18 provides for three kinds of participation: By appellants, by intevenors, and by other persons or organizaitons who submit written comments. Current requirements for appellants and intervenors are similar. However, an invervenor may enter the appeal process at any time and thus delay the process while appellants have an opportunity to review and comment on intervenors' submissions. Appellants must enter an appeal within 45 days of the date of the decision being appealed. Their material is shared with subsequent intervenors who have an opportunity to comment.

In contrast, the proposed rule makes no distinction between an appellant or an intervenor. The rule treats all interested persons or organizations equally and allows for accepting comments from others who do not wish to formally participate in the review. Forest Service employees are expressly excluded as participants, because the agency provides internal mechanisms to address employee concerns. Federal organizations are also excluded because procedures are available under 40 CFR Parts 1500–1508 for interagency resolution of issues.

Section 217.5 Obtaining notice of decisions. This section would establish a new requirement that responsible field officials publish legal notice of decisions subject to review under Part 217 in a newspaper of general circulation, except for Records of Decision, notice of which is published in the **Federal Register**. Notice of all initial decisions by the Chief would be published in the **Federal Register**. This requirement addresses a continuing problem under the current rules and complies with the intent of the National Environmental Policy Act (NEPA), the National Forest Management Act, and implementing regulations, policies, and procedures that the public is entitled to receive notice and to have an opprotunity to comment.

Section 217.6 Decisions subject to review. Nearly all agency decisionmaking concerning planning and mangement of National Forest System lands and resources is subject to the provisions of NEPA and/or the National Forest Management Act, implementing regulations, policies, and procedures. As a consequence, forest officers document their decisions in "Records of Decisions," "Decision Notices," or "Decision Memos." It is these types of decisions, and no others, that are reviewable under this subpart.

As in the proposed written instrument appeal rule, paragraph (c) clarifies that decisions signed by a forest officer who is an acting line officer or decisions made by a forest staff acting within delegated authority are considered to be decisions of the line officers. Questions on this have arisen from time to time under the existing rule and have confused some Forest Service officers and appellants as to where an appeal should be filed.

Section 217.7 Decisions not subject to review. This section retains as excludable from review the same decisions that are currently excluded from appeal in 36 CFR 211.18. In addition, it updates the list of excluded decsions to reflect the enforcement of Uniform Rules for Protection of Archaeological Resources at 36 CFR Part 296, which requires imposing civil penalties for violations covered by those rules and to reflect enforcement of prohibitions and orders related to National Forest System administration at 36 CFR Part 261. In addition, reflecting the agency's experience with the devastating forest fire season of 1987, the rule would now exclude decisions related to rehabilitation of National Forest System lands resulting from natural catastrophes if the Regional Forester or Chief finds and gives notice in the Federal Register that good cause exists for excluding such decisions from review. Also excluded from review under this rule would be policies and procedures issued through regulation or the Forest Service directive system, participation in which is covered by the Adminsitrative Procedures Act and 36 CFR Part 216, respectively. This section also contains a conforming amendment excluding decisions applicable only to a holder or applicant of a written instument and thus appealable only under the new process proposed for 36 CFR Part 251, Subpart C.

Paragraph (b) would clarify that when initial project decisions are subject to review under Part 217, subsequent decisions related to implementation of the decision will not be reviewable, unless those subsequent decisions are preceded by a separate decision document. For example, a decision to offer a timber sale cannot subsequently be challenged again at the time a sale is advertised or awarded. This provision applies only to projects and activities as defined at § 217.8(b)(3). This limitation is needed to bring closure to administrative decision reviews. It also responds directly to the finding during review of the current rule that many decisions are effectively appealed several times because there is currently no limitation on appealing implementation actions. This recycling of appeals has led to long delays and interruptions in some national forest programs and has offered an opportunity for abuse of the process that was never intended.

Section 217.8 Levels of review available. This section would entitle requesters to only one level of review for decisions made by field officers, in contrast to the two levels of review curently provided in 36 CFR 211.18. Limiting review to only one level of review responds to the findings and conclusions that the current process takes too long. However, with one exception, the rule would permit discretionary review of appeal decisions by the next higher officer and would require each Reviewing Officer to immediately forward an appeal decision letter to the higher officer to enable that officer to decide whether to exercise the discretion to review the Reviewing Officer's decision. As with 36 CFR Part 251, Subpart C, it is felt that providing for discretionary review retains an important internal management control over review decisions.

The exception is that decisions to reoffer returned or defaulted timber sales made after October 30, 1986, would not be subject to discretionary review. This exception is mandated by section 320 of the appropriations act for Fiscal Year 1987 (Pub. L. 99-591) which specified that only one level of appeal be offered for these decisions.

One of the findings of the agency's review of the current rule was that the process was costly to the taxpayers. Over a 4-year period, $16 million could be attributed to agency staff work to administer the process. Reducing the appeal/review process from two levels to a one-level appeal/review, with discretion at the next level, has the potential to save at an average, a million dollars a year, as can be seen in the following chart:

TABLE 3.—WORKLOAD AND COSTS ATTRIBUTABLE TO SECOND LEVEL OF APPEAL UNDER 36 CFR 211.18

Level	Total number of all appeals	Total costs (dollars)	Percent workload 2d level appeals	Costs attributable to 2d level appeals
Fiscal year 1986				
SO	539	$2,034,208	4	$79,254
RO	735	1,907,530	17	324,408
WO	335	650,102	31	201,822
Total		4,591,840	[1] (13)	[2] 605,485
Fiscal year 1987				
SO	668	2,056,035	8	163,129
RO	799	1,843,757	42	777,654
WO	413	945,676	69	650,295
Total		4,845,468	[1] (33)	[2] 1,591,077

[1] Weighted average.

[2] Reducing the appeal/review process from two levels to a one-level appeal/review, with discretion at next level, has the potential to save these costs, average for past two fiscal years = $1,098,281.

SO—Forest Supervison Offices, RO—Regional Offices, WO—Washington Office.

As in the current rule and the proposed rule for appeal of written instruments, initial decisions by the Chief of the Forest Service would be subject to discretionary review by the Secretary of Agriculture, but a requester is not entitled to this level of review. As noted under the discussion of Part 251, this difference in treatment of appeal of initial decisions reflects the differing scope and nature of decisions made by an Agency head and also reflects the practical reality that automatic review of all decisions by the Chief is inconsistent with the scope of work and responsibility assigned to a cabinet officer.

Section 217.9 Filing procedures and timelines. The procedures in this section are the same as in the current rule, except that the request would be filed with the Reviewing Officer, not the Deciding Officer, and the 45-day period for filing would be computed from the date of publication of notice of the written decision. The rule would make clear that it is the responsibility of the appellant to file the notice properly and by the end of the filing period. The rule would retain legible postmarks as evidence of timely filing in event of question.

Section 217.10 Extension of time. Except for time to file a request for review and for discretionary review of lower level review decisions, a Reviewing Officer has the discretion to extend the time periods under the rule at the request of requesters, and the Deciding Officer, or to extend the time for issuing the appeal decision. These procedures are the same as in the current rule.

Section 217.11 Content of a request for review. In contrast to the current rule, the requirements for the contents of a request for review in the proposed rule are very specific. The detailed list of information that is to be provided is necessary to inform requesters of the evidence and argument they must present in order for the Reviewing Officer to review the challenged decision. As in the proposed written instrument rule, the proposed rule makes clear that requesters bear the burden of showing in a request for review why the decision should be changed.

Section 217.12 Requests to delay implementation of a decision. In contrast to the current rule, the proposed rule specifies that implementation of land and resource management plans (forest plans) prepared pursuant to 36 CFR Part 219 will not be delayed. This limitation is appropriate because the concept of a stay is inconsistent with the nature of plans, which are guiding documents for subsequent activities and developments. There are no actions in a forest plan per se that would be immediately implementable and thus there are no actions to be stayed. The proposed rule would permit a requester to request delay of implementation when a project or activity would be implemented during the pendency of a review. In such cases, the request would be granted unless the Reviewing Officer determines there is an urgent and compelling need to proceed with the activity.

The proposed rule departs from the current rule in that the time to rule on a delay request would be 10 days instead of 21, and the decision is not subject to further review or appeal. Additionally, the proposed rule does not contain the stringent requirements of the current rule as to the information a stay request must contain. All of these proposed changes are consistent with the intent of simplifying the process to make it less costly to administer, easier to use, and not as lengthy.

This section also adds a new provision that requires delays to remain in effect for the 15-day period for deciding whether to conduct a discretionary review of the lower level review decision and automatically extends the stay during pendency of the discretionary review. This provision thus preserves the interests of requester(s) during the additional review period.

Section 217.13 Review file. This section defines what constitutes the review file at both the first level of review and at the discretionary level of review. In contrast to the existing rule at 36 CFR 211.18, the responsibility for assembling and maintaining the review file would reside with the Reviewing Officer. This eliminates an occasionally expressed concern of appellants that it appears to be a conflict of interest for the Deciding Officer to maintain the record. In the interest of expediting and streamlining the appeal process at the discretionary review level, the second-level Reviewing Officer would be limited to the record assembled at the first level and the review decision letter of the lower level reviewing officer. The rule would expressly prohibit reopening the record at the second level.

This section also specifies how much time the Deciding Officer would have to assemble the relevant decision documents and pertinent records and transmit them to the Reviewing Officer.

In contrast to the existing rule and the proposed written instrument rule, the Deciding Officer would not be required to prepare a Responsive Statement. Instead, the rule would allow the Deciding Officer, in transmitting the decision documentation, to respond briefly to issues raised in the request for review. Since review of the decision is to be based on documents prepared in the decisionmaking process, the decision should be adequately addressed in that documentation and there should be no need for long rebuttals from Deciding Officers. As part of its strengthened management of the decision review and appeal processes, the Forest Service plans to monitor Deciding Officer performance carefully on this point and to take prompt corrective action should this provision begin to result in delays because Deciding Officers are preparing lengthy responses to issues raised by requesters.

Section 217.14 Authority of reviewing officer in conduct of a review. This section would authorize the Reviewing Officer to establish whatever procedures are necessary to ensure orderly and expeditious conduct of a review. Such procedural matters would not be subject to appeal and further review. This section retains the provision of the current rule allowing a Reviewing Officer to consolidate reviews of the same decision or similar decision involving common issues of fact or law and to issue an review decision covering these reviews. The Reviewing Officer must give notice to all parties of a decision to consolidate multiple reviews.

In keeping with the informal nature of the decision review process, the rule would permit a Reviewing Officer, except at the discretionary review level, to request additional information from the requester, the Deciding Officer, or anyone who has submitted written comments. The Reviewing Officer would also have authority to discuss issues related to the review with requesters, the Deciding Officer, or those who submit comments.

As in the written instruments proposed rule, this section would make clear that, when the Secretary elects to review an initial decision of the Chief, all the rules and procedures applicable to other first-level reviews would apply to the Secretary's review.

Section 217.15 Review decision. As in the proposed written instrument rule, this section of the proposed rule provides greater specificity to Reviewing Officers than the current rule on the nature of the decision to be rendered and continues the 30-day time from closure of the review file for rendering appeal decisions, except for decisions involving review of land and resource management plan approval, amendment, or revision when the time is extended to 90 days. This section also would clarify that unless a review decision is reviewed at the next level, that decision stands as the final administrative decision of the Department of Agriculture on the matter.

In an effort to reduce the time it would take to complete a review and to end the uncertainty of the status of a review when a decision is not rendered within 30 days by a Reviewing Officer at the discretionary level of review, the rule proposes the same approach as that in the proposed written instruments rule. Under the proposal, when a discretionary review of an Reviewing Officer's decision is not completed by the end of the 30-day period, the discretionary review would automatically terminate and the decision of the lower level Reviewing

Officer stands as the final administrative decision of the Department. The rule would also require notice to requesters in this event, bringing a much-needed management control to the process. As noted in the discussion of this feature of the written instruments proposed rule, this 30-day limit on discretionary review responds directly to the public criticism that emerged during review of the existing rule: namely, that the Forest Service holds appellants and intervenors to strict compliance with timeframes but often does not itself comply with the timeframes established in the rule. A survey of appeals case workloads shows that second-level reviews (including discretionary reviews) result in the longest delays in rendering appeal decisions. Thus, this proposal to tighten the time period for issuance of discretionary decisions should be an effective remedy.

Section 217.16 Dismissal without review and decision. This section is virtually identical to that in the proposed written instrument rule. It would made more explicit the various circumstances that will result in the dismissal of a request for review without a decision on the merits. Refer to the prior discussion of dismissal under § 251.100 for the list of changes from the current dismissal rules under 36 CFR 211.18.

Section 217.17 Resolutions of issues during review. In keeping with the stated objective of giving greater emphasis to discussions between the Forest Service Deciding Officer and persons interested in National Forest management to work cooperatively to resolve issues where possible, this section in the proposed rule authorizes the Deciding Officer to discuss the issues and try to resolve them, if possible, even during the review process. As in the written instrument proposal, the emphasis in on improving direct communication between the agency and the public on working together toward mutual agreement rather than emphasing the adversarial approach of an appeals process.

Finally, this section retains the provision of the current rule that a Deciding Officer may withdraw a decision, in whole or in part, during the review.

Section 217.18 Policy in event of judicial proceedings. This section is identifical to that in the proposed written instrument rule.

Conforming Amendments

This rulemaking also proposes several conforming amendments to rules in other parts of Chapter II affected by the procedures proposed for Parts 217 and 251. First, the current appeal regulations at 36 CFR 211.17 and 211.18 would be amended to allow for continuation of appeals brought under those rules prior to the effective date of the final rule and to exclude from appeal under those rules, new appeals of any decision issued after the effective date of the final rules. The rules at 36 CFR Part 228, Subpart A—Locatable Minerals, which have provided a separate appeal procedure for mining operating plans, would be amended to provide for appeal under 36 CFR Part 251, Subpart C, the new written instruments appeal rule.

Public Comment

The Forest Service is interested in hearing from individuals, organizations, and other public agencies about these proposed rules. To aid in analysis of comments, it would be helpful if reviewers would key their comments to specific sections. Respondents should also be aware that, in analyzing and considering comments in promulgation of the final rule, the Forest Service will give more weight to substantive comments than to simple "yes," "no," or "check-off" responses to form letter/questionnaire-type submissions. To assist reviewers in commenting on this proposed rulemaking, an abbreviated side-by-side comparison of the current rule and the two proposals is provided in Appendix A as a reference tool.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

Based on both experience and environmental analysis, this proposed rule would not have a significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and therefore imposes no paperwork burden on the public.

List of Subjects

36 CFR Part 211

Administrative practice and procedure, National forests.

36 CFR Part 228

Environmental protection, Mines, National forests, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—rights-of-way, Reporting and recordkeeping requirements, Water resources.

Therefore, for the reasons set forth above, it is proposed to amend Title 36 of the Code of Federal Regulations as follows:

PART 211—ADMINISTRATION

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System

2. Add a new paragraph (o) to § 211.17 to read as follows:

§ 211.17 Appeal of decisions to reoffer returned or defaulted timber sales on National Forests.

* * * * *

(o) *Continuance of appeals.* Appeals filed under this section prior to [*Insert effective date of final rule.*] shall continue to be processed under the procedures of this section. Any decision to reoffer returned or defaulted timber sales made after [*Insert effective date of final rule.*], shall be subject to the review procedures of Part 217 of this chapter.

3. Amend paragraph (s) of § 211.18 by adding a sentence to the end of the paragraph as follows:

§ 211.18 Appeal of decisions of forest officers.

* * * * *

(e) * * * The procedures of this section shall not apply to any request to appeal or review a decision filed after [*Insert effective date of final rule.*]

4. Add a new Part 217 to read as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS

Sec.

217.1 Purpose and scope.
217.2 Applicability and effective date.
217.3 Definitions and terminology.
217.4 Eligible participants.
217.5 Obtaining notice of decisions.
217.6 Decisions subject to review.
217.7 Decisions not subject to review.
217.8 Levels of review available.
217.9 Filing procedures and timeliness.
217.10 Extension of time.
217.11 Content of a request for review.
217.12 Requests to delay implementation of a decision.
217.13 Review file.
217.14 Authority of reviewing officer in conduct of review.
217.15 Review decision.
217.16 Dismissal without review and decision.
217.17 Resolution of issues during review.
217.18 Policy in event of judicial proceedings.

Authority: 16 U.S.C. 551, 472.

§ 217.1 Purpose and scope.

(a) This subpart provides a process by which a person or organization interested in the management of the National Forest System may challenge certain planned actions prior to implementation and obtain review of the intended action by a higher level official. These rules establish who may request review of planned actions, the kind of decisions that may be challenged, the responsibilities of the participants in a decision review, and the procedures that apply.

(b) The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System decisionmaking prior to implementation of various decisions. The rules are not intended to provide an adjudication process. Accordingly, these rules establish a minimum or procedures to guide the review process. The intent of the part is to provide an expeditious, uncomplicated review of decisions by an official at the next administrative level.

§ 217.2 Applicability and effective date.

(a) The review procedures established in this part apply to all disputes of and requests to review decisions filed after [*Insert effective date of this rule.*].

(b) Requests to review decisions filed under 36 CFR 211.17 and 211.18 prior to [*Insert effective date of this rule.*] remain subject to those procedures.

§ 217.3 Definitions and terminology.

For the purposes of this part—

Deciding Officer means the Forest Service line officer who has the delegated authority and responsibility to make the decision being challenged under these rules.

Decision document means a written document that a Deciding Officer signs to execute a decision subject to review under this part. Specifically a Record of Decision, a Decision Notice, or Decision Memo.

Decision documentation refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, a project file for proposed actions categorically excluded from documentation in an environmental assessment or environmental impact statement, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

Decision Memo is a concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement.

Decision Notice means the written document signed by a Deciding Officer when the decision was preceded either by preparation of an environmental assessment (40 CFR 1508.9) or by a determination of categorical exclusion (40 CFR 1508.4).

Decision review is the term used to refer to the process provided in this part by which a higher level officer reviews a decision of a subordinate officer in response to a request for review.

Forest Service line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Record of Decision is the document signed by a Deciding Officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

Request for review is the written document filed with a Reviewing Officer by one who objects to a decision covered by this part and who requests review by the next higher line officer.

Requester is the term used to refer to a person or organization (or an authorized agent or representative acting on their behalf) filing a request for review under this part.

Reviewing Officer is the line officer one administrative level higher than the Deciding Officer or, in the case of a discretionary review, one level higher than the line officer who issued a first-level review decision.

§ 217.4 Eligible participants.

(a) Any person, other than a Forest Service employee, or any non-Federal organization or entity may challenge a decision covered by this part and request a review by a Forest Service line officer at the next administrative level.

(b) Any person or organization interested in review of a decision under this part may submit written comments to the Reviewing Officer for inclusion in the review file.

§ 217.5 Obtaining notice of decisions.

For decisions subject to review under this part that are made at the Ranger District, National Forest, and Regional Office levels, the responsible Forest Service official shall publish legal notice of each decision in a newspaper of general circulation, except for decisions documented in Records of Decision, notice of which is published in the Federal Register. For decisions that are made by the Chief that are subject to review under this part, notice shall be published in the Federal Register.

§ 217.6 Decisions subject to review.

(a) Except as provided in § 217.7 of this part, written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of the National Environmental Policy Act, the National Forest Management Act, implementing regulations, policies, and procedures are subject to review under this part.

(1) Only decisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to review under this part. Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act processes made prior to release of final plans, guides, and environmental documents are not reviewable until issuance of decision documents.

(2) Forestry research and State and private forestry programs and activity decisions are subject to review under this part, if a specific decision would be carried out directly on National Forest System lands.

(b) Decisions subject to review under this part include, but are not limited to:

(1) Approval, amendment, and revision of a forest land and resource management plan prepared pursuant to 36 CFR Part 219.

(2) Approval, and amendment of a regional guide for forest planning prepared pursuant to 36 CFR 219.8.

(3) Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

(c) Decisions on any of the matters listed in this section made by an authorized subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer to whom the subordinate employee reports.

§ 217.7 Decisions not subject to review.

(a) The following decisions are not subject to review under this part:

(1) Decisions appealable to the Agriculture Board of Contract Appeals, U.S. Department of Agriculture, under 7 CFR Part 24.

(2) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(3) Decisions for which the jurisdiction of another Government agency or the Comptroller General supercedes that of the Department of Agriculture.

(4) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendation in question.

(5) Decisions appealable under separate administrative proceedings, including but not limited to, these under 36 CFR 223.117, Administration of Cooperative or Federal Sustained Yield Units; 7 CFR 21.104, Eligibility for Relocation Payment or Amount; and 4 CFR Part 21, Bid Protests.

(6) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(7) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(8) Decisions covered by the Contract Disputes Act.

(9) Decisions involving Agency personnel matters.

(10) Decisions where relief sought is reformation of a contract or award of monetary damages.

(11) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

(12) Decisions embodied in rulemaking promulgated in accordance with the Administrative Procedures Act (5 U.S.C. 551 *et seq.*) or in policies and procedures issued in the Forest Service Manual and handbooks (36 CFR Parts 200, 216).

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or to issue order or violations of prohibitions and orders under 36 CFR Part 261.

(14) Decisions solely affecting the business relationship between the Forest Service and applicants for or holders of written instruments for occupancy and use of National Forest System lands that arise from issuance, approval, or administration of the authorization, except as provided for at 36 CFR 251.86.

(b) In addition to decisions excluded from review by paragraph (a) of this section, the Forest Service shall dismiss any request to review a subsequent implementing action that results from an initial decision for projects and activities subject to review under this part as defined at § 217.6(b)(3). For example, an initial decision to offer a timber sale is reviewable under this part; subsequent actions to advertise or award that sale are not reviewable under this part. A subsequent implementation decision that is documented in a new decision document would be subject to review under this part.

§ 217.8 Levels of review available.

(a) *Decisions made below the level of the Chief of the Forest Service.*

The rules of this part entitle the public to only one level of administrative review of written decisions by Forest Service line officers below the level of the Chief. The levels of available review are as follows:

(1) If the decision is made by a district Ranger, the request for review is filed with the Forest Supervisor;

(2) If the decision is made by a Forest Supervisor, the request for review is filed with the Regional Forester;

(3) If the decision is made by a Regional Forester, the request for review is filed with the Chief of the Forest Service.

(b) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the request for review is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a request to review, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 217.14 of this part.

(c) *Discretionary review of review decisions.* Except for decisions to reoffer returned or defaulted timber sales made after October 30, 1986, review decisions rendered by Forest Service line officers pursuant to this part are subject to discretionary review by the officer at the next higher level.

(1) The levels of discretionary review are as follows:

(i) If the Reviewing Officer is the Forest Supervisor, the Regional Forester has discretion to review.

(ii) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.

(iii) If the Reviewing Officer is Chief, the Secretary of Agriculture has discretion to review.

(2) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review.

(3) Within one day following the date of a review decision rendered by a Forest Service Reviewing Officer, that officer shall forward a copy to the next higher officer, so the superior officer has

full opportunity to exercise the discretion granted in this section.

(4) The higher level officer shall have 15 days from date of receipt to decide whether or not to review, and may call for and use the review file in deciding whether or not to review the decision. If that officer takes no action by the expiration of the 15-day period, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. The requester(s) shall be notified whether or not the decision will be reviewed.

§ 217.9 Filing procedures and timeliness.

(a) *Filing procedures.* To request review of a decision under this part, a person or organization must:

(1) File a written request for review in accordance with the provisions of § 217.11 of this part with the next higher line officer;

(2) File the request for review within 45 days of the date notice of the decision was published (§217.5).

(b) *Computation of time periods.* (1) The day after a notice of decision is published (§ 217.5) is the first day of the time period for filing a review request. All other time periods applicable to this part also will be calculated to begin on the first day following an event or action related to the review.

(2) All time periods in this rule are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing a request for review; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(3) Simultaneously send a copy of the request for review to the Deciding Officer.

(c) *Evidence of timely filing.* It is the responsibility of the party requesting review of a decision to file the request by the last day of the filing period. In the event of question, a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timely filing of the request. Pursuant to § 217.14 of this part, a Reviewing Officer's decision on timely filing is not subject to review.

§ 217.10 Extension of time.

(a) *Requests for review.* The time period for filing a request for review is not extendable.

(b) *All other time periods.* Requesters, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this part unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section, a Reviewing Officer at the levels described in § 217.8(a) and (b) of this part may extend all other time periods under this part

(1) Where good cause exists, a Reviewing Officer may extend the time for the Deciding Officer to assemble and transmit relevant decision documents. In case of extension, the Reviewing Officer shall notify the requester(s) of the extension and the new date.

(2) Except for discretionary reviews conducted pursuant to § 217.8(c) of this part, a Reviewing Officer may extend the time period of issuance of the review decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues pursuant to § 217.17 of this part.

§ 217.11 Content of a request for review.

(a) It is the responsibility of those who request review of a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a requester must file a written request with the Reviewing Officer that:

(1) Lists the name, address, and telephone number of the requester;

(2) Identifies the decision to which the requester objects;

(3) Identifies the document in which the decision is contained by title and subject, date of the decision, and name and title of the Deciding Officer.

(4) Identifies specifically that portion of the decision or decision document to which the requester objects;

(5) States the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy;

(6) Identifies the specific change(s) in the decision that the requester seeks; and

(7) Identifies whether or not the requester has participated in public participation opportunities offered in the decisionmaking process and, if so, the extent of that participation.

§ 217.12 Requests to delay implementation of a decision.

(a) Requests to delay implementation of land and resource management plans prepared pursuant to 36 CFR Part 219 shall not be granted.

(b) Where a project or activity would be implemented before a review decision could be issued which would moot the review, the Reviewing Officer shall accept and grant written requests to delay implementation of the decision pending completion of the review, unless the Reviewing Officer determines there is an urgent, compelling need to proceed with the project.

(c) The requester must file the request to delay implementation with the Reviewing Officer, and provide a copy to the Deciding Officer.

(d) The Reviewing Officer shall rule on delay requests within 10 days of receipt of a request and shall give notice of the decision to the requester(s) and the Deciding Officer.

(e) A decision may be implemented during a review unless the Reviewing Officer has granted a delay in implementation.

(f) A Reviewing Officer's decision on a request to delay implementation of a project or activity is not subject to review at the next administrative level.

(g) When a delay in implementation is granted, it shall, at a minimum, remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.8(c)). If the higher level officer decides to review the Reviewing Officer's decision, implementation shall be delayed until a decision is issued, or until the end of the 30-day review period provided in § 217.15(c), whichever is less.

§ 217.13 Review file.

(a) It is the responsibility of the Reviewing Officer to assemble and maintain in one location a file of documents related to the decision and review.

(b) The review of decisions under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct a decision review consists of the request for review, any written comments submitted by interested parties, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any decision-review related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.14 of this part.

(c) Upon receipt of a copy of the request for review, the Deciding Officer shall assemble the relevant decision documentation (§ 217.3) and pertinent records and transmit them to the Reviewing Officer within 21 days.

(d) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate how and where the documentation addresses the issues raised in the request for review. The Deciding Officer may also respond briefly to issues raised in the request for review. The Deciding Officer shall provide a copy of the transmittal letter to the requester(s).

(e) Unless the Reviewing Officer has ruled otherwise or has requested additional information pursuant to § 217.14(c) of this subpart, the review file will close upon receipt of the decision documentation from the Deciding Officer.

(f) The decision review file is open to public inspection.

(g) The rules of paragraphs (a) through (e) of this section apply only to the review file at the first level of review (§ 217.6 (a) and (b)). Where an official exercises the discretion in § 217.8(c) of this subpart to review a review decision, the discretionary review shall be made on the existing review file, the Reviewing Officer's review decision, any orders of the Reviewing Officer to extend a delay of implementation, and any petitions to change or lift a delay of implementation. The file shall not be reopened to accept additional submissions from any party to the review or from the Reviewing Officer whose review decision is being reviewed.

§ 217.14 Authority of reviewing officer in conduct of a review.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the review.

(1) In case of multiple requests for review of a decision, the Reviewing Officer may prescribe special procedures as necessary to conduct the review.

(2) The requester(s) and Deciding Officer shall receive notice of any procedural instructions or decision governing conduct of a review.

(3) Procedural instructions and decisions are not subject to review by higher level officers.

(b) *Consolidation of multiple requests for review.* The Reviewing Officer shall determine whether to issue one review decision or separate decisions in cases of multiple requests for review of the same decision. In the event of a consolidated decision, the Reviewing Officer shall give advance notice to all who have requested review of the decision.

(1) Decisions to consolidate a review decision are not subject to review by higher level officers.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may consolidate transmittal of decision documentation to the Reviewing Officer and respond to statements in multiple requests for review in one transmittal letter.

(c) *Requests for additional information.* At any time during the review, the Reviewing Officer conducting a review at the levels specified in § 217.6 (a) and (b) of this part may request additional information from a requester, the Deciding Officer, or anyone who has submitted written comments related to the review. At any level of review (§ 217.6), the Reviewing Officer may discuss issues related to review of a decision with the Deciding Officer (or first level Reviewing Officer), requesters or those who comment on a pending review, or their authorized agents or representatives, as needed to clarify information submitted or to seek resolution of the issues in question.

(d) *Conduct of review of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 217.8(b)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this part.

(e) *Conduct of other discretionary reviews.* Where a higher level officer elects to review a decision rendered by a Reviewing Officer (§ 217.8(c)), the rules of this section do not apply, except that, as provided in paragraph (c) of this section, the officer conducting the discretionary review may discuss issues related to the review with the first level Reviewing Officer, the requester(s), or those who submitted comments.

§ 217.15 Review decision.

(a) The Reviewing Officer should issue a final review decision within 30 days of receipt of decision documentation from the Deciding Officer, except that for review of land and resource management plan approval, amendment, or revision decisions, the Reviewing Officer may take 90 days to issue a decision. The Reviewing Officer shall notify the requester(s) and Deciding Officer if more time is needed and the new date. The Reviewing Officer shall send a copy of the decision to any requester, the Deciding Officer, and to others upon request.

(b) The Reviewing Officer's decision shall affirm or reverse the original decision in whole or in part. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) A review decision must be consistent with applicable law, regulations, and orders.

(d) Unless a higher level officer exercises the discretion to review a Reviewing Officer's decision as provided at § 217.8, the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and that decision is not subject to further review under this part.

(1) In the case of a discretionary review pursuant to § 217.8, the second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to a requester that the lower level decision will be reviewed.

(2) If a discretionary review decision is not issued by the end of the 30-day review period, the review is automatically terminated and the decision of the lower level Reviewing Officer stands as the final administrative decision of the Department. In such case, the requester(s) shall be notified.

§ 217.16 Dismissal without review and decision.

(a) A Reviewing Officer shall dismiss a request for review and close the review file without decision on the merits when:

(1) The request is not received within the time specified in § 217.9 of this part;

(2) The requested relief or change cannot be granted under existing law, fact, or regulation;

(3) The request for review fails to meet the minimum requirements of § 217.11 of this part to such an extent that the Reviewing Officer lacks adequate information on which to base a decision;

(4) The decision at issue is being reviewed under another administrative proceeding;

(5) The decision is excluded from review pursuant to § 217.7 of this part;

(6) The requester(s) withdraws the request for review; or

(7) The Deciding Officer withdraws a decision.

(b) Dismissal decisions are not reviewable by the next higher officer.

§ 217.17 Resolution of issues during review.

(a) At any time during the decision review process, the Deciding Officer may discuss the issues in dispute with the requester(s) and other persons and seek resolution of the issues in dispute. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review to allow for conduct of meaningful negotiations.

(b) The Deciding Officer has the authority to withdraw the decision at issue during the review period. If the

Deciding Officer decides to withdraw the decision, both the Reviewing Officer and the requester(s) shall be notified, and the Reviewing Officer shall close the review file and notify the requester(s) that the case is dismissed. A Deciding Officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to review under this part.

§ 217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plantiff has first sought to invoke and exhaust the procedures available under this part.

PART 228—MINERALS

5. The authority citation for Part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 551), and 94 Stat. 2400.

Subpart A—Locatable Minerals

6. Revise § 228.14 to read as follows:

§ 228.14 Appeals.

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

PART 251—LAND USES

7. Add a new Subpart C to Part 251 to read as follows:

Subpart C—Appeals of Decisions Related to Occupancy and Use of National Forest System Lands

Sec.
251.80 Purpose and scope.
251.81 Applicability and effective date.
251.82 Definitions and terminology.
251.83 Parties eligible to participate in appeals.
251.84 Appealable decisions.
251.85 Decisions not appealable under this subpart.
251.86 Election of appeals process or decision review procedures.
251.87 Levels of reviews available.
251.88 Filing procedures and timeliness.
251.89 Extension of time.
251.90 Notice of appeal content.
251.91 Responsive statement.
251.92 Implementation and requests for stay of implementation.
251.93 Ruling on stay requests.
251.94 Duration of and changes to stay decisions.
251.95 Intervention.
251.96 Oral presentations.
251.97 Authority of reviewing officer in conduct of appeals.
251.98 Appeal record.
251.99 Appeal decision.
251.100 Dismissal without decision.
251.101 Resolution of issues by means other than appeal.
251.102 Policy in event of judicial proceedings.

Subpart C—Appeals of Decisions Related to Occupancy and Use of National Forest System Lands

Authority: 16 U.S.C. 551, 472.

§ 251.80 Purpose and scope.

(a) This subpart provides a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands may appeal a written decision by an authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. The rules in the subpart establish who may appeal under these rules, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various procedures and timeframes that will govern the conduct of appeals under this subpart.

(b) The rules in this subpart seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of issues arising from the issuance, approval, and administration of written instruments that authorize the occupancy and use of National Forest System lands.

§ 251.81 Applicability and effective date.

(a) Except where applicants or holders elect the decision review procedures of Part 217 of this Chapter, all appeals of decisions arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands as defined at § 251.85 of this subpart shall be subject to the provisions of this subpart as of [*Insert date of effective date of this rule*].

(b) Appeals of the type covered by this subpart and filed prior to [*Insert effective date of this rule*] shall continue to be conducted under the provisions of 36 CFR 211.18.

§ 251.82 Definitions and terminology.

For the purposes of this subpart, the following terms are defined:

Administration of a written instrument or authorization to occupy and use National Forest System lands. A broad, all inclusive phrase used throughout this subpart to connote the full range of actions and decisions a forest officer takes to manage authorized uses of National Forest System lands, including, but not limited to, enforcement of terms and conditions included in written authorizations to which a holder has agreed, modification of terms and conditions, and suspension, cancellation, and/or termination of an authorization.

Appeal. A request to a higher ranking officer for relief from a written decision filed under this subpart by an applicant for or a holder of a written instrument issued or approved by a Forest Service line officer.

Appeal decision. The written decision rendered by the Reviewing Officer on an appeal for relief under this subpart. The use of this term is limited to the final decision of a Reviewing Officer and does not refer to decisions to grant, deny, or change a stay or to any other determinations or procedural orders made on the conduct of an appeal (§ 251.97).

Appeal record. The documents submitted to the Reviewing Officer by an appellant, intervenor, or Deciding Officer (§ 251.98).

Appellant. An eligible applicant for or holder of a written instrument issued for the occupancy and use of National Forest System land (or their authorized agent or representative) who files an appeal pursuant to the provisions of this subpart (§ 251.83).

Deciding Officer. The Forest Service line officer who makes a decision related to issuance, approval, or administration of an authorization to occupy and use National Forest System lands that is appealed under this subpart.

Forest Service line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Intervenor. An individual who, or organization that, is an applicant for or holder of the written instrument, or of similar instrument, issued by the Forest Service that is the subject of an appeal, has an interest that could be affected by an appeal, has made a timely request to intervene in that appeal, and has been granted intervenor status by the Reviewing Officer (§ 251.95).

Issuance of a written instrument of authorization. Applies both to decisions to grant and to deny a written instrument or authorization.

Notice of appeal. The document prepared and filed by an appellant to dispute a decision subject to review under this subpart (§ 251.90).

Oral presentation. An informal meeting (in person or by telephone) at which an appellant, intervenor, and/or Deciding Officer may present information related to an appeal to the Reviewing Officer (§ 251.96).

Parties to an appeal. The appellant(s), intervenor(s), and the Deciding Officer.

Responsive statement. A written document prepared by a Deciding Officer that responds to the notice of appeal filed by an appellant.

Reviewing Officer. The officer at the next administrative level above that of the Deciding Officer who conducts appeal proceedings, makes all necessary rulings regarding conduct of an appeal, and issues the appeal decision.

Written instrument or authorization. Any of those documents listed in § 251.84 of this subpart issued or approved by the Forest Service authorizing an individual, organization or other entity to occupy and use National Forest System lands and resources.

§ 251.83 Parties eligible to participate in appeals.

Only the following may participate in the appeals process provided under this subpart:

(a) An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, filed a formal written request for a written authorization to occupy and use National Forest System land covered under § 251.84 of this subpart and

(1) Was denied the authorization, or

(2) Was offered an authorization subject to terms and conditions that the applicant finds unreasonable or impracticable.

(b) The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land covered under § 251.84 of this subpart who seeks relief from a written decision related to administration of that authorization.

(c) An intervenor as defined in § 251.82 of this subpart.

(d) The Deciding Officer who made the decision being appealed under this subpart.

§ 251.84 Appealable decisions.

(a) The rules of this subpart govern appeal of written decisions of Forest Service line officers regarding issuance or administration of the following written instruments to occupy and use National Forest System lands:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of Title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR Part 222, Subpart A.

(4) Mining plans of operating under 36 CFR Part 228, Subpart A.

(5) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay, and other similar materials) under 36 CFR Part 228, Subpart C.

(6) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR Part 251, Subpart A.

(7) Special use authorizations issued under 36 CFR Part 251, Subpart B, except, as provided in § 251.60(g), for suspension or termination of easements issued pursuant to 36 CFR 251.53 (e) and (l).

(8) Land exchange agreements under 36 CFR 254.11 and decisions to proceed with land exchanges.

(9) Mining operating plans for the Sawtooth National Recreation Area issued under 36 CFR 292.17 and 292.18.

(10) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.

(11) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act 1979 and 36 CFR Part 296.

(12) Approval of Surface Use Plans.

(13) Decisions to consent, not to consent, to object, or not to object to the issuance of mineral leases.

(14) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR Part 292, Subpart C.

(b) Written decisions on any of the matters listed in paragraph (a) of this section issued by a Forest Service staff officer with delegated authority to act for a Forest Service line officer are considered to be decisions of the line officer.

(c) A Deciding Officer shall give written notice of decisions subject to appeal under this subpart to applicants and holders defined in § 251.83 of this subpart and to any holder of like instruments who has made a written request to be notified of a specific decision. The notice shall include a statement of the Deciding Officer's willingness to meet with applicants or holders to hear and discuss any concerns or issues related to the decision (§ 251.101). The notice shall also specify the name of the officer to whom an appeal of the decision may be filed, and the address and deadline for filing an appeal.

§ 251.85 Decisions not appealable under this subpart.

The following decisions are not appealable under this subpart:

(a) Decisions appealable to the Agriculture Board of Contract Appeals, USDA, under 7 CFR Part 24.

(b) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(c) Decisions for which the jurisdiction of another Government agency, the Comptroller General, or a court to hear and settle disputes supersedes that of the Department of Agriculture.

(d) Recommendations of Forest Service line officers to higher ranking Forest Service line officers or to other entities having final authority to implement the recommendation in question.

(e) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117 (Administration of Cooperative for Federal Sustained Yield Units); 7 CFR 21.104 (Eligibility for Recreation Payment of Amount); and 4 CFR Part 21 (Bid Protests).

(f) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.

(g) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(h) Decisions covered by the Contract Disputes Act.

(i) Decisions involving Agency personnel matters.

(j) Decisions where relief sought is reformation of a contract or award of monetary damages.

(k) Decisions made during the preliminary planning or the National Environmental Policy Act that precede decisions to implement the proposed action.

(l) Decisions related to National Forest land and resource management plans and projects only reviewable under 36 CFR Part 217.

(m) Decisions related to rehabilitation of National Forest Systems lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice that good cause exists to exempt such decisions from appeal under this subpart.

(n) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR Part 261.

(o) Reaffirmation of prior decisions to terminate a special use authorization.

§ 251.86 Election of appeals process or decision review procedures.

(a) No decision can be appealed by the same person under both this subpart and Part 217 of this chapter.

(b) Should a decision be reviewable under this subpart as well as Part 217 of this chapter, a party who qualifies to bring an appeal under this subpart can elect which process to use to request review of a decision, and in so doing, the appellant thereby forfeits all right to appeal that same decision under the other review process.

§ 251.87 Levels of review available.

(a) *Decisions below the level of the Chief of the Forest Service.* The rules of this subpart entitle appellants to only one level of administrative review of written decisions by Forest Service line officers. The levels are as follows:

(1) If the decision is made by a District Ranger, the appeal is to the Forest Supervisor;

(2) If the decision is made by a Forest Supervisor, the appeal is to the Regional Forester;

(3) If the decision is made by a Regional Forester, the appeal is to the Chief of the Forest Service.

(b) *Decisions Made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the appeal is to the Secretary of Agriculture. Review by the Secretary is discretionary. Within 15 calendar days of receipt of a timely notice of appeal, the Secretary shall determine whether or not to review the decision. If the Secretary has not decided whether or not to review the decision by the expiration of the 15-day period, the appellant shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture.

(c) *Discretionary Review of Appeal Decision.* Appeal decisions rendered by Forest Service Reviewing Officers are subject to discretionary review by the superior officer at the next administrative level.

(1) The levels of discretionary review are as follows:

(i) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review the appeal decision.

(ii) If the Reviewing Officer was a Regional Forester, the Chief has discretion to review the appeal decision.

(iii) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review the appeal decision.

(2) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review.

(3) Within one day following the date an appeal decision by a Forest Service Reviewing Officer is signed, the Reviewing Officer shall forward a copy to the next higher officer so the superior officer has full opportunity to exercise the discretion granted in this section.

(4) The next higher level officer shall have 15 calendar days from date of receipt to decide whether or not to review an appeal decision and may call for or use the appeal record in deciding whether or not to review the appeal decision. If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

§ 251.88 Filing procedures and timeliness.

(a) *Filing procedures.* In order to appeal a decision under this subpart, an appellant must:

(1) File a notice of appeal in accordance with § 251.90 of this subpart with the next higher line officer as identified in § 251.84(b).

(2) File the notice of appeal within 45 days of the date on the notice of the written decision being appealed (§ 251.84(c)); and

(3) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(b) *Evidence of timely filing.* It is the responsibility of those filing an appeal to file the notice of appeal by the end of the filing period. In the event of question, legible postmarks will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timeliness of the notice of appeal. A Reviewing Officer's decision on timely receipt is not subject to appeal or review.

(c) *Computation of time period for filing.* (1) The time period for filing a notice of appeal of a decision under this subpart begins on the first day after the Deciding Officer gives written notice of the decision. All other time periods applicable to this subpart also will be computed to begin on the first day following an event or action related to the appeal.

(2) Time periods applicable to this subpart are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday the filing time is extended to the end of the next Federal working day.

§ 251.89 Extension of time.

(a) *Filing of notice of appeal.* Time for filing a notice of appeal is not extendable.

(b) *All other time periods.* Appellants, Intervenors, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this subpart, unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section, the Reviewing Officer may extend all other time periods under this subpart.

(1) For appeals filed in accordance with § 251.87(a) and (b) of this subpart, a Reviewing Officer, where good cause exists, may grant a written request for extension of time to file a responsive statement or replies thereto. The Reviewing Officer shall rule on requests for extensions within 10 days of receipt of the request and shall provide written notice of the extension ruling to all parties to the appeal.

(2) Except for discretionary reviews of appeal decisions conducted pursuant to § 251.87(c) of this subpart, a Reviewing Officer may extend the time period for issuance of the appeal decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues pursuant to § 251.101 of this subpart.

§ 251.90 Notice of appeal content.

(a) It is the responsibility of an appellant to provide a Reviewing Officer sufficient narrative evidence and argument to show why a decision by a lower level officer should be reversed or changed.

(b) An appellant must include the following information in a notice of appeal:

(1) The appellant's name, mailing address, and daytime telephone number;

(2) The title or type of written instrument involved, the date of application for or issuance of the written instrument, and the name of the responsible Forest Service Officer;

(3) A brief description and the date of the written decision being appealed;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the facts of the dispute and the issue(s) raised by the appeal;

(6) Specific reference to any law, regulation, or policy that the appellant believes to be violated and the reason for such an allegation;

(7) A statement as to whether and how the appellant has tried to resolve the issue(s) being appealed with the Deciding Officer, the date of any discussion, and the outcome of that meeting or contact; and

(8) A statement of the relief the appellant seeks.

(c) An appellant may also include in the notice of appeal a request for oral presentation (§ 251.96) or a request for stay of implementation of the decision pending decision on the appeal (§ 251.93).

§ 251.91 Responsive statement.

(a) *Content.* A responsive statement contains the Deciding Officer's response to the specific facts or issues of law or regulation, and requested relief set forth by the appellant in the notice of appeal.

(b) *Timeframe.* Unless the Reviewing Officer has granted an extension, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal.

(c) *Replies.* Within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer. Appellants and intervenors must end a copy of any reply to a responsive statement to all parties to the appeal, including the Deciding Officer.

§ 251.92 Implementation and request for stay of implementation.

(a) A decision may be implemented during an appeal unless the Reviewing Officer grants a stay.

(b) An appellant or intervenor may request a stay of a decision at any time while an appeal is pending, if the harmful effects alleged pursuant to paragraph (c)(3) of this section would occur during the pendency of the appeal.

(c) To request a stay of decision, an appellant or inervenor must:

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), to intervenor(s), and to the Deciding Officer;

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped; and

(C) How the cited effects and impacts would prevent a meaningful or decision on the merits.

(d) A Deciding Officer and other parties to an appeal may provide the Rewiewing Officer with a written response to a stay request. A copy of any response must be sent to all parties to the appeal.

§ 251.93 Ruling on stay requests.

(a) *Timeframe.* The Reviewing Officer may rule on a stay request at any time but must rule no later than 10 calendar days from receipt.

(b) *Denial where implementution is not imminent.* The Reviewing Officer may deny any request to stay implementation of a decision that is not scheduled to begin during pendency of the appeal.

(c) *Criteria to consider.* In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to § 251.92(c) of this subpart including the validity of any claim of adverse effect on the requester;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(e) *Notice of Decision on a Stay Request.* A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to all parties to the appeal.

§ 251.94 Duration of and changes to stay decisions.

(a) *Duration.* A stay shall remain in effect for the 15-day period for determining discretionary review (§ 251.87(c)), unless changed by the Reviewing Officer in accordance with paragraph (b) of this section. In conducting a discretionary review of an appeal decision pursuant to § 251.87(c) of this subpart, a Reviewing Officer may extend the stay, in whole or in part, during pendency of the discretionary review.

(b) *Change in a Stay.* A Reviewing Officer may change a stay decision in accordance with any terms established in the stay decision itself or at any time during pendency of an appeal that circumstances support a change of stay. In making any changes to a stay decision, the Reviewing Officer must issue a written notice to all parties to the appeal explaining the reason for making the changes and setting forth any terms or conditions that apply to the change.

(c) *Petitions to Change a Stay.* An appellant or intervenor may also petition a Reviewing Officer to change or lift a stay at any time during the pendency of a stay. Such petitions must be in writing, must explain how circumstances have changed since the stay was imposed, and must state why the change in the stay is being requested. The petitioner must send a copy of the petition to all parties to the appeal.

(d) *Appeal of Stay Decision or Changes in Stay.* A Reviewing Officer's decision to grant, deny, lift or otherwise change a stay is not subject to further appeal and review.

§ 251.95 Intervention.

(a) A request to intervene in an appeal may be made at any time prior to the closing of the appeal record at the first level of appeal (§ 251.87(a)). Requests to intervene in an appeal at the discretionary review level (§ 251.87(c)) shall be denied.

(b) To request intervention in an appeal under this subpart, a party, at a minimum, must:

(1) Submit a written petition to intervene to the Reviewing Officer;

(2) Be, as defined at § 251.83 of this subpart, an applicant for or party to a written instrument issued by the Forest Service that is the subject of or affected by the appeal and have an interest that could be directly affected by a decision on the appeal, and

(3) Show in the request for intervention, how the decision on the

appeal would directly affect petitioner's interests.

(c) The Reviewing Officer determines whether a party requesting intervention meets the requirements of paragraph (a) of this section. In granting intervention, the Reviewing Officer must give notice to all other parties to the appeal.

(d) A grant or denial of intervention is not subject to appeal to a higher level.

(e) Appellants and intervenors must concurrently furnish copies of all submissions to each other as well as the Deciding Officer. Failure to provide each other copies may result in removal of a submission from the appeal record. At the discretion of the Reviewing Officer, appellants may be given additional time to review and comment on initial submissions by intervenors.

(f) An intervenor cannot continue an appeal if the appellant withdraws the appeal.

§ 251.96 Oral presentations.

(a) *Purpose.* An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal, to present their viewpoints to the Reviewing Officer. The purpose is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.

(b) *Requests.* Only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (§ 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal.

(c) *Participation.* At the discretion of the Reviewing Officer, oral presentations may be open to public attendance, but participation is limited to parties to the appeal. The Reviewing Officer shall advise all parties to the appeal, including the Deciding Officer, of the place, time, and date of the conference, and how the conference will be conducted. All parties to an appeal shall be invited to participate. Appellants and intervenors must bear any expense involved in making an oral presentation in person or by telephone.

(d) *Limitation.* Oral presentations shall be held only at the first level of appeal (§ 251.87(b)).

§ 251.97 Authority of reviewing officer in conduct of appeals.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.

(b) *Consolidation of appeals.* A Reviewing Officer may consolidate multiple appeals of the same decision, or of similar decisions involving common issues of fact or law and issue one appeal decision. In such case, the Reviewing Officer shall give notice to all parties to multiple appeals.

(1) A decision to consolidate appeals is not subject to appeal and further review.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may prepare one responsive statement to multiple appeals.

(c) *Requests for additional information.* Except in discretionary reviews conducted pursuant to § 251.87(c) of this subpart, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. The Reviewing Officer shall notify all parties of the request or information from other sources, provide all parties an opportunity to comment, and extend time periods if necessary.

(d) *Conduct of appeals of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 251.87(b)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this subpart.

(e) *Conduct of other discretionary reviews.* Where a higher level officer elects to review an appeal decision rendered by a Reviewing Officer (§ 251.87(c)), the rules of this section do not apply. Stays may be extended or changed in accordance with the provisions of § 251.94. As provided in § 251.95 and § 251.96 of this subpart, oral presentations and intervention requests at this level of review shall be denied.

§ 251.98 Appeal record.

(a) The following rules apply only to the appeal record for appeals at the first level (§ 251.87 (a), (b) of this subpart):

(1) It is the responsibility of the Reviewing Officer to assemble and maintain in one location the documents related to the appeal.

(2) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence.

(3) The Reviewing Officer has discretion to remove from the record documents that were not sent to all parties to an appeal.

(4) Unless the Reviewing Officer has ordered otherwise, the appeal record closes with the expiration of the time period for filing of the reply(ies) to the responsive statement, or at the conclusion of an oral presentation, if there is one. The Reviewing Officer shall notify all parties to an appeal of the closure of the record.

(5) The appeal record is open to public inspection.

(b) Where an official exercises the discretion in § 251.87(c) of this subpart to review an appeal decision, the discretionary review shall be made on the existing appeal record, the Reviewing Officer's appeal decision, any orders of the Reviewing Officer to extend a stay, and any petitions to change or lift a stay. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer whose appeal decision is being reviewed.

§ 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and existing law, regulation, orders, policy and procedure.

(b) The Reviewing Officer shall affirm or reverse the original decision in whole or in part and include the reason(s) for the decision. The Reviewing Officer may also include in the appeal decision instructions for further action by the Deciding Officer.

(c) At the first level of review, the Reviewing Officer should make and issue an appeal decision within 30 days of the date the record is closed. The Reviewing Officer must notify the parties to the appeal if more time is needed.

(d) Unless the next higher officer exercises the discretion to review an appeal decision provided in § 251.87 of this subpart, the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review under this subpart or Part 217 of this chapter.

(1) In the case of a discretionary review pursuant to this § 251.87, the second level Reviewing Officer shall

conclude the review within 30 days of the date of notice issued to an appellant that the lower level decision will be reviewed.

(2) If a discretionary review decision is not issued by the end of the 30-day review period, the review is automatically terminated and the decision of the lower level Reviewing Officer stands as the final administrative decision of the Department. In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified.

(e) The Reviewing Officer shall provide a copy of the decision to all appellants, intervenors, the Deciding Officer, and in the case of discretionary review, the lower level Reviewing Officer.

§ 251.100 Dismissal without decision.

(a) The Reviewing Officer shall dismiss an appeal and close the record without a decision on the merits when:

(1) The appellant is not eligible to appeal a decision under this subpart.

(2) Appellant's notice of appeal is not filed within the required time period, or the notice of appeal fails to meet the minimum requirements of § 251.90 of this subpart to such an extent that the Reviewing Officer lacks adequate information on which to base a decision.

(3) In cases where there is only one appellant, the appellant withdraws the appeal.

(4) The requested relief cannot be granted under existing law, fact, or regulation;

(5) The appeal of a decision is excluded from appeal under this subpart;

(6) The Deciding Officer has withdrawn the decision under appeal.

(7) A request for review of the same decision has been filed by the same person under Part 217 of this Chapter.

(b) The Reviewing Officer shall give written notice of dismissal that includes an explanation of why the appeal is dismissed.

(c) A decision to dismiss an appeal is not subject to further appeal and review.

§ 251.101 Resolution of issues by means other than appeal.

(a) Authorized Forest Service officers shall, to the extent practicable and consistent with the public interest, consult and meet in person, or less preferably by phone, with holders of written instruments prior to issuing written decisions related to administration of a written authorization. The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision.

(b) When decisions are appealed, the Deciding officer may discuss the appeal with the appellant(s) and intervenors together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decison on the appeal. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review to allow for conduct of meaningful negotiations.

(c) The Deciding Officer has the authority to withdrawn a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing Officer must receive written notice.

§ 251.102 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this subpart is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the procedures of this subpart.

Date: March 21, 1988.

James C. Overbay,

Deputy Chief.

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APPENDIX A
COMPARATIVE REVIEW (BY SECTION) CURRENT RULE 36 CFR 211.18, AND PROPOSED RULES 36 CFR 251 SUBPART C AND 36 CFR 217

Note: This appendix is for comparative purposes only. It will not appear in the Code of Federal Regulation.

An appeals process, in its most traditional sense, is adjudicatory, by which a party who has a legal right and who believes the right was violated, chooses a process to address the grievance. During an administrative appeal, the agency looks at what happened and judges the rightness or wrongness and prescribes a remedy.

The Forest Service appeal process has from time-to-time been limited to grievance procedures, but over time the process has become broader in scope. While 36 CFR 211.18 has some trappings of an adjudicatory process, it is used less as a grievance process (15%) than as a review-of-operations process (85%).

The recommendation, therefore, is for a 2-rule dispute resolution process, distinguished by the types of decisions at issue and the degree of agency discretion in making the decision. One rule would be for decisions relating to land and resource management plans, projects, and activities conducted in compliance with the National Environmental Policy Act (36 CFR 217); the other for decisions arising from the issuance or administration of written authorizations for the occupancy and use of National Forest System lands (36 CFR 251, Subpart C).

Basic Principles Underlying 36 CFR Part 251, Subpart C	Basic Principles Underlying 36 CFR, Part 217
Subject matter involves an authorization which conveys or involves a legal relationship between an instrument holder and the Forest Service under a law or statute; origin is in the Constitution or a statute or regulation. Process is somewhat adjudicatory and has procedural guarantees for all parties.	Subject matter involves decisions wholly within the discretion of the agency to make and which do not involve a legal relationship between the agency and the aggrieved party. Process provides a means to protest decision and is informal with minimum of procedural requirements.
	Public has a right to receive notice and to have an opportunity to comment on proposed action.
Dispute is usually about a past action. Facts exist about the authorized occupancy or use at time decision made.	Dispute is about a future action authorized by the decision on which review is requested.
Remedy for dispute resides within or may be interpreted from the written instrument involved, statute, or regulation.	Remedy for dispute is to perform the "action" differently or not at all and lies wholly within the agency's discretion to accomplish.
Since written instrument can already be in effect at time of appeal, stay procedures are essential.	Since action to be taken under the decision is in the future, stay of decision may or may not be essential.

Comparative Analysis of 36 CFR 211.18/ 36 CFR 251, Subpart C/36 CFR 217

Current Rule 36 CFR 211.18	Proposed Process for Appeal of Written Instrument Decisions, 36 CFR Part 251, Subpart C	Proposed Decision Review Process, 36 CFR Part 217
What is Appealable and What are the Exclusions?		
(a) Decisions of Forest Officers unless excluded in (b)(1)-(11)	§251.84;.85 Decisions affecting a written instrument, including certain applications; basically excludes same decisions as current rule	.§217.6;.7 Limited to actions arising from NEPA compliance, i.e., decisions recorded in Records of Decision, Decision Notices, Decision Memos; basically excludes same decisions as current rule
Definitions		
None provided	§251.82 Special terms defined	§217.3 Special terms defined
Who May Appeal?		
(a)(1-2) Anyone who objects to a forest officer's decision	§251.83 Holders of written instruments and certain applicants	§217.4 Any person or organization who objects to a decision, except Forest Service employees or Federal agencies
How is Notice Given?		
(a)(2) Written notice to instrument holders; published notices	§251.84 Written notice of decisions; notice specifies Reviewing Officer address to which appeal must be filed and date for filing	§217.5 Notice of decisions published in newspaper or Federal Register
Provision for Conflict Resolution (Negotiation)		
No provision, but alluded to in agency directives (FSM 1571.02 and 1571.03)	§251.84;.90;.101 Decision notice must include invitation to meet and discuss; notice of appeal should state if appellant has met with Deciding Officer to resolve; Reviewing Officer may stop clock to allow negotiation; Deciding Officer may meet w/parties during appeal	§217.17 Authorizes Deciding Officer to resolve dispute while review is in progress

Filing an Appeal and Extensions (c) (d) File w/i 45 days w/Deciding Officer, supporting documents filing extendable; Reviewing Officer may give extensions except NOA	§251.88 File Notice of Appeal (NOA) in 45 days w/Reviewing & Deciding Officer; supporting documents filed with NOA; no extensions for filing NOA	§217.9 Request for decision review must be filed 45 days from date notice of decision is published; supporting documents filed with request; no extensions
Statement of Reasons (c) Required w/in 45 days of filing appeal, unless Reviewing Officer extends	§251.90 No separate statement of reasons required or allowed; all information is in Notice of Appeal	§217.11 All supporting information is required in the request for review; no separate statement of reasons allowed
Responsive Statement (g) Required w/in 30 days after Statement of Reasons received from appellant	§251.91 Due to Reviewing Officer in 30 days unless extension granted; copy to all parties	§217.13 None required; Deciding Officer describes how existing documents respond to requesters issues; 21 days to forward; may briefly respond to issues; agency plans to monitor performance closely
Levels of Appeal (f) 2 levels on initial decisions; procedural levels cannot exceed levels of review available for appeal of initial decision	§251.87 1 level; permits discretionary review by next higher level officer; 15 days to decide; if reviewed, 30-day limit for decision	§ 217.8 1 level of review; permits discretionary review by next higher level officer; 15 days to decide; if review, 30-day limit for decision
Intervention (l) Anyone with an immediate interest; same rights as appellants; may intervene at any time; can carry appeal forward	§251.95 Limited to like holders or applicants only; cannot continue appeal if appellant withdraws; not available for discretionary level	§217.4 No intervention; interested persons limited to filing written comments

Stays		
(h) Request any time to Reviewing Officer; Reviewing Officer rules in 21 days; requests are detailed and must be site-specific; Reviewing Officer may change decision; stay decisions appealable; decisions may be implemented immediately if stay not requested/granted	{251.92;.93;.94 Similar to current rule except must rule in 10 days; not subject to discretionary review by higher level; stay remains in effect through 15-day period for deciding on discretionary review; can be extended or revised if discretionary review undertaken	{217.12 Called delay of implementation; no delay for forest plans; if project implementation imminent, will be delayed upon request; if project not scheduled to begin until after review is completed, will not be delayed; if granted, remains in effect through 15-day period for deciding on discretionary review and 30-day discretionary review period, if undertaken
Oral Presentations		
(m) Request due 45 days from decision; Reviewing Officer sets procedures; parties can add summary to record afterwards	{251.96 Only appellant may request; automatic if requested at time of appeal, discretionary if requested later; all appellants, intervenors, and Deciding Officer may participate; appellant(s) & intervenors must bear any expense of participation; not available at discretionary level	Not applicable
Timeliness		
(c) 1st level = 45 days; 2nd level = 30 days; USPS postmark precedential; timeliness decided by Reviewing Officer; timeliness decisions appealable	{251.88 Appeal must be filed within 45 days; postmark precedential; timeliness decisions not appealable	{217.9 Similar to appeals of written instruments
Procedural Matters Rulings		
(o) Decisions on stays and dismissals are appealable, if level available	{251.94;.100 No appeals of procedural rulings (stays or dismissals)	{217.12;.16 No further review of procedural rulings allowed
Information Gathering by Deciding or Reviewing Officer		
(q) Reviewing Officer may suspend process and request additional information if record considered inadequate to issue a decision	{251.97;.101 Allows Reviewing Officer to request additional information except at discretionary level; Deciding Officer may discuss appeal with appellants and intervenors—without explicit obligation to document	{217.14;.17 Allows Reviewing Officer to request additional information except at discretionary level; either Officer may consult jointly or separately w/anyone to gain information or discuss issues during review

20-Day Comment Period on Responsive Statement		
(g) Parties may comment on Deciding Officer's responsive statement; extensions may be granted; filed w/Deciding Officer	**§251.91** Same as current rule except filed w/Reviewing Officer w/copy to Deciding Officer	Not applicable
Deciding Officer Authority		
Implicit in several subsections	**§251.101** More explicit than current rule; permits Deciding Officer to withdraw decision; can discuss appeal w/appellants & intervenors and negotiate	**§217.17** Similar to written instruments
Reviewing Officer Authority in Conduct of Appeal/Review		
Implicit in several subsections	**§251.97** More explicit than current rule; Reviewing Officer may issue procedural orders, stop clock for negotiation, request more information; makes explicit that if the Secretary reviews an initial decision of the Chief, that review will be subject to rules applicable to other first-level appeals; limits authority of Reviewing Officer at the discretionary level	**§217.14;.15** Similar to written instruments
Consolidation of Appeals		
(n) Reviewing Officer may consolidate multiple appeals of same decision and permit Deciding Officer to prepare one responsive statement	**§251.97** Same as current rule	**§217.14** Similar to current rule
Continuations		
(s) Allowed continuation of appeals already begun under former rule	**§251.81** Allows continuation of appeals already begun under current rule	**§217.2** Same as written instruments
Appeal Record		
(p) Defined as to content; requires closure; assembled by Deciding Officer	**§251.98** Similar to current rule; assembled by Reviewing Officer	**§217.13** Called review file; contents simpler because emphasis is on documentation existing at time of initial decision; assembled by Reviewing Officer

Appeal Decision		
(q) Based only on closed record; due in 30 days from closure date; notify parties if more time needed	§251.99 Similar to current rule; may affirm, reverse or modify the decision; automatic termination of discretionary review if decision not rendered in 30 days	§217.15 Called "review decision"; 90 days if review is of the approval of a LMP; 30 days on all others; otherwise similar to written instruments; automatic termination of discretionary review if decision not rendered in 30 days
Standard of Review		
No provision but appeals handbook (FSH 1509.12) states "correctness" as standard	§251.99 No standard; appeal decision must include the reasons for the decision	§217.15 Same as under appeals of written instruments
Suspensions		
(q) Limits to suspending for further information if record inadequate; FSM 1509.12 limits suspension to acquiring existing information	§251.97;.101 Reviewing Officer may extend time periods as needed to acquire information or allow for conduct of negotiations at first level only; specific term suspension not utilized	§217.17 Similar to written instruments

[FR Doc. 88-10739 Filed 5-13-88; 8:45 am]

BILLING CODE 3410-11-C

PREPARED STATEMENT OF ANTHONY COLTER, SENIOR RESOURCE MANAGER, LOUISIANA PACIFIC CORPORATION, DEER LODGE, MT

I. INTRODUCTION

I am Tony Colter, Senior Resource Manager for Louisiana Pacific Corporation in Deer Lodge, Montana. Louisiana Pacific has three wood products manufacturing facilities in Montana. We have sawmills located in Deerlodge and Libby, and a particle board plant in Missoula. The operation of each of these facilities depends upon the availability of timber from Montana's National Forests.

II. THE APPEAL AND LITIGATION OF TIMBER SALES ARE CAUSING A SEVERE RESTRICTION IN TIMBER SUPPLIES

Our ability to secure necessary resources for all of our Montana facilities has been substantially encumbered during the past several years by the growing number of appeals and legal disputes. In the Deer Lodge market area approximately 42 mmbf of timber has been delayed from advertisement during the last 2 years due to appeals and sales voluntarily withdrawn by the Forest Service due to appeal threats. This is enough timber to run our Deer Lodge sawmill for 1 year.

Timber for our Deer Lodge sawmill comes primarily from the Deerlodge, Helena, and Beaverhead National Forests. Each of these forests has completed land and resource management plans in accordance with the National Forest Management Act of 1976. However, each of the forest plans were appealed, and, subsequently, many of the timber sales prepared by the Forest Service in conjunction with these plans have also been appealed. Consequently, in 1988 only 60 percent of the program level authorized by the forest plans was available and offered for sale.

The impact of unresolved disputes on our Libby sawmill is even more distressing. We depend almost entirely on the purchase of national forest timber from the Kootenai National Forest in northwestern Montana to sustain this facility. In 1988, the Kootenai Forest sold only 179 mmbf of the planned 241 mmbf timber program. Like the Deerlodge, the Kootenai National Forest has a final forest plan in place. The nearly 60 mmbf shortfall on the Kootenai National Forest, approximately enough timber to sustain our Libby sawmill for 2 years, is the direct result of an injunction issued by the Ninth Circuit Court of Appeals in July, 1988. Of course, preceding the Appellant Court action, there was a long series of administrative appeal reviews followed by a District Court decision upholding the Forest Service's plan.

The root of this entire matter was a Forest Service decision reached in the early 1980's to reconstruct a portion of the road network in the Yaak drainage of the Kootenai Forest. The decision was supported by an environmental analysis (EA) completed in the late 1970's. Most of the Yaak road construction and reconstruction work authorized by the Forest Service's decision has long been complete.

In the interim, the Forest Service prepared and finalized in 1987 a new forest plan for the Kootenai National Forest. However, the appeals court was then just reviewing a complaint brought against the several-year-old Yaak road EA. The Court found that the Forest Service had failed in the Yaak EA to take a broad enough look at the "cumulative effects" of the road construction decision, and timber sales and other activities which would subsequently be served by the road. In response, the Forest Service is now in the process of developing yet another environmental impact statement which will attempt to satisfy the deficiencies identified by the Court.

In the interim, 60 mmbf of the Kootenai Forest's planned timber program is under injunction until the dispute is resolved. Even more distressing is the fact that several million board feet of insect-damaged timber is deteriorating beyond the point of commercial harvest in the Yaak, since the injunction has stopped salvage efforts.

I hope this Subcommittee can appreciate how bitter some of us became when we recognized that several hundred of our jobs are immediately in jeopardy while timber rots in the woods due to an alleged dispute over a road which has already been built. A critical review of the Yaak injunction must lead any rational person to the conclusion that the procedural complexities of the Forest Service decisionmaking process, combined with the inequities of the processes for administrative and judicial review of Forest Service decisions, is unworkable, unjust, and only serves to benefit a limited segment of the public.

Our particle board manufacturing plant in Missoula has also not escaped the impact of errant appeals and litigation. We purchase sawdust and planner shavings from the sawmills in Montana to supply this facility. Since sawdust and shavings are a residue product of the timber manufacturing process, the availability and price of residues is a direct result of timber availability. As appeals and litigation have constrained timber supplies for the sawmills, we are beginning to see a concurrent, although lagged, reduction in the availability of mill residues. Our Missoula particle board plant's dependence on Federal timber supplies is often overlooked in analyses of the impacts resulting from further reductions to the availability of timber in Montana.

III. THE SHORTAGE OF RAW MATERIAL SUPPLY IN OUR WORKING AREA HAS A RIPPLE EFFECT ON THE MONTANA ECONOMY

To wrap up my discussion on timber supply, I am compelled to recognize the ripple effect of timber shortages caused by unresolved appeals and litigation. As Deer Lodge, Montana is located in the approximate center of the timber producing region of the State, "ripple effects" are immediately evident, but extremely difficult to precisely quantify. For example, unresolved appeals have virtually halted planned national timber programs from the Beaverhead and Gallatin Forests, which are to the south and east of Deerlodge.

As a result, our competitors in Dillon and Livingston, Montana are pressed to reach into the Deerlodge market area in an effort to secure necessary timber to support their operations. The same is true for our competitors to the north and west who, because of appeal problems on the Flathead, Lolo, and Bitterroot National Forests, are now actively pursuing timber in nontraditional market areas. Some may argue that this is normal and healthy competition. Competition is intensified by shrinking raw material supply. However, in this case it is far from healthy.

During the mid 1980's, as Montana's forest products industry came out of a severe recession, the industry geared itself to be competitive and to meet record levels of timber demand. Then we got hit with a double blow. First, the new NFMA forest plans reduced Federal timber programs by about 20 percent from previous levels. Second, unresolved appeals and litigation are severely constraining the Forest Service's ability to eventually meet the reduced programs. As a result, competition for the national forest timber sales which are available is extreme, with many sales being purchased above current market break-even rates by companies trying desperately to avoid production curtailments or plant closures.

There is little question that the inability to deliver the timber programs authorized by the forest plans is having extreme consequences on our company's operations in Montana. This is a serious problem, with devastating consequences, which must be addressed now to avoid additional hardship with long-lasting effects throughout our industry in the State.

IV. THE APPEALS PROBLEM CREATES UNCERTAINTY AND NEEDS TO BE RESOLVED

Although I have a great deal of firsthand experience with the consequences of the appeals and litigation problem, I cannot claim to be an expert in the appeals process itself. Thus, I will leave the discussion of specific elements of the Forest Service appeals process to those who are qualified in this area. However, it is my general view—shared by many in our industry and in the local timber communities of Montana—that the appeals and litigation process is heavily tilted in favor of those who wish to obstruct the implementation of Forest Service timber programs. Those of us who have a vital interest in seeing the environmentally sound timber programs go forward, simply seem to have no meaningful way to protect our interests. There is a widespread and deep felt feeling of unfairness which needs recognition.

V. A RECENT SETTLEMENT AGREEMENT ON THE DEERLODGE PROVIDES A GLIMMER OF HOPE

In spite of this bad news, there have also been some glimmers of hope that reasonableness may prevail in this hotly disputed matter. Recently, a formal Settlement Agreement was signed by several appellants of the Deerlodge Forest Plan. I am pleased to have been a part of the discussions which led to this settlement.

The agreement calls for the Forest Service to develop an amendment to the Deerlodge Forest Plan which examines specific ways to provide improved wildlife habitat and hunting opportunities for big game, while simultaneously evaluating ways to increase timber program levels. I believe, as do the others who participated in the discussions, that we have identified reasonable proposals for the Forest Service to accomplish both objectives.

As a result of this effort, all parties to the Agreement will withdraw their appeals of the Deerlodge Forest Plan. Furthermore, we have all agreed to meet again if further disputes arise.

In understanding this success, it is necessary to recognize several conditions which allowed the agreement to be reached. First, I believe everyone who came to these discussions felt they had something to gain and something to lose. Although I am not sure I fully understand why, I am convinced that the environmental interests represented in these discussions wished to negotiate an acceptable settlement. Without this flexibility, little progress could have been made.

Second, the ecology of the Deerlodge National Forest made it possible for everyone to emerge a winner. There were enough potential timber harvest opportunities and wildlife habitat opportunities on the forest so that both our interests could be met.

Third, we were able to overcome the hurdle of defining environmental objectives as something more meaningful than "less roads and less timber harvest." Thus, we were able to progress with meaningful discussions on how to harvest timber in a manner which better meets other objectives, rather than simply push and shove on the question of whether to cut timber at all.

Fourth, and possibly most importantly, we had the luxury to spend the time necessary to learn each other's point of view, and consequently to develop a level of trust and respect for each other's position. From this understanding we were then able to collectively embrace changes which would meet each other's objectives.

Although I am pleased with this settlement, it is important that it not be characterized as more, or less, than it really is. Although I believe we have made significant progress, it would be naive to think that this agreement has settled the appeals problem on the Deerlodge. The most evident shortcoming is that it does not bind individuals or organizations who were not party to the agreement. We have already received word that some preservation organizations are preparing to appeal the agreement. Further, nothing in the agreement limits individuals or organizations from filing harassment appeals of individual timber sales as they come forward under the plan. Only time will tell if there is sufficient good faith among all interests on the Deerlodge National Forest to ensure that this agreement and the Deerlodge Plan can now be fully implemented.

Finally, I would be remiss if I did not recognize the role the Forest Service played in reaching this agreement. The Forest Service's role is a difficult one because the Agency is not a disinterested third party. For negotiations to be successful, the Agency must recognize the need to actively advance its interests while simultaneously providing credible and objective data and analyses. The Deerlodge National Forest staff acted admirably during the 17 months the discussions progressed. Now they must also be equally diligent about fully implementing the agreement and the forest plan outputs.

VI. NEGOTIATIONS ON OTHER FORESTS MAY BE DIFFICULT

Now that the Deerlodge discussions are complete, I am frequently asked by my colleagues in the Montana forest products industry as well as government and civic leaders about my views on the possibility of using similar negotiations to solve disputes on other national forests. I always respond first by reviewing the four elements previously cited which, I believe, were necessary for our success on the Deerlodge.

As I considered these questions, however, it has also occurred to me that the opportunity for reaching mutually agreeable solutions is significantly reduced if the forest industry is asked to negotiate under duress. Specifically, I do not believe productive negotiations are either possible or desirable when significant portions of vital timber programs are being withheld due to appeals or injunctions. Those conditions are the equivalent to negotiating with terrorists who have planted a bomb on an airplane. The circumstances are so unjust that it will simply not be possible to develop the trust necessary to productively discuss possible solutions.

I appreciate the opportunity to testify and will be happy to answer any questions you may have.

PREPARED STATEMENT OF H. MICHAEL ANDERSON, FOREST PLANNING SPECIALIST, THE WILDERNESS SOCIETY, WASHINGTON, DC

Good afternoon. I am Michael Anderson, forest planning specialist for the Wilderness Society. I am accompanied by Jay Watson, director of the Society's National Forest Action Center. The Wilderness Society is a 55-year-old national conservation organization dedicated to wilderness preservation and the wise management of our Nation's public lands. Our current membership exceeds 280,000 members.

I am pleased to testify on issues surrounding the Forest Service administrative appeals process. The Forest Service recently adopted a new set of appeals regulations that are designed to "streamline" the appeals process. The regulations are largely untested, so we have yet to see how well they will answer the concerns raised by the timber industry, the environmental community, and the agency itself.

For the last several years, the Wilderness Society has worked closely with conservationists from across the country on national forest planning and management issues. During that time there has been a major surge of public interest and concern about how the Forest Service is managing the national forests. Clear-cutting in the southern Appalachians, liquidation of ancient forests in the Pacific Northwest, and below-cost timber sales in the Rocky Mountains and elsewhere are some of the issues that have aroused intense controversy.

The public's growing dissatisfaction with Forest Service management decisions has resulted in a sharp increase in appeals. According to the General Accounting Office, the number of appeals more than doubled between 1983 and 1988. Appellants have included State attorneys general, environmental organizations, State departments of fish and game, sport and commercial fishing interests, the timber and oil and gas industries, and private citizens.

The appeals system has become a lightning rod in a raging storm of controversy over national forest management. As this committee is well aware, Congress has never statutorily required a Forest Service administrative appeals process. On the other hand, Congress has periodically reviewed how well the process operates, as evidenced by the Senate Agriculture Committee's input on the new appeals regulations. The Society applauds the committee's exercising its oversight authority to review the effectiveness of the appeal regulations rather than legislatively defining the process. The Wilderness Society opposes any legislative restrictions to the appeals process, such as those advocated by the timber industry, because they deny the right of American citizens to challenge agency decisions.

Appeals have become a favorite scapegoat for the timber industry. According to recent industry statements, appeals are a primary cause of log supply shortages and mill closures throughout the West.

Contrary to these claims, appeals have actually had very little effect on the amount of timber supplied by the national forests. On a national basis, the Forest Service has sold between 10.7 and 11.3 billion board feet annually over the last 6 years. In 1988, the Forest Service sold 11.0 billion board feet, which is about average for recent years. In the regions where appeals have purportedly had the greatest effect—Montana, northern Idaho, Washington, Oregon, and California—timber sales in 1988 totaled 7.78 billion board feet, which is slightly more than the 7.56 billion board foot average for the previous 3 years.

Appeals also have not prevented logging on national forests from reaching record levels. Nationwide, national forest timber harvest levels in 1987 and 1988 were 12.7 billion board feet and 12.6 billion board feet, respectively, compared to an average of 10.6 billion board feet in the previous 4 years. Similarly, logging in Montana, northern Idaho, Washington, Oregon, and California totaled 8.56 billion board feet in 1988, compared to an average of 7.97 billion board feet in the previous 3 years.

Clearly, timber supply is being affected to a far greater extent by factors other than the appeals process. One log in four cut in the Pacific Northwest, Idaho, and Montana is being exported with no domestic milling. Record logging levels on the national forests have diminished the amount of timber under contract. The failure to enact Montana and Idaho wilderness legislation and concurrently releasing roadless lands to development has effectively reduced the amount of land available for timber production in these two States. Overcutting on private lands will soon cause a drop in overall timber production. Finally, midlevel planning, or "resource area analysis," also affects timber supply on some national forests.

The Wilderness Society recently concluded a critique of a Montana Department of Commerce report titled "The Southwest Montana Mill Crisis." This report alleges that appeals are forcing two mills near the Beaverhead and Gallatin National Forests out of business and sets forth several recommendations for a legislative solution to the appeals situation. Mr. Chairman, I request the Wilderness Society's critique be introduced into the hearing record.

With respect to the Montana Department of Commerce study, we believe that appeals were incorrectly blamed for timber sale shortfalls on the Gallatin and Beaverhead National Forests. In fact, less than 20 percent of the Gallatin timber sale program was delayed by appeals in 1988. As discussed in our critique of the Department of Commerce's study, the primary reasons for the shortfalls appear to be the failure to enact a Montana Wilderness Bill with release language and the Forest Service's problems in implementing a new "resource area analysis" process.

Of course, there are also problems associated with the appeals process. Most notable are the delays in the processing of appeals by the Forest Service itself, as noted in the recent General Accounting Office report. For example, conservationists filed an appeal of the forest plan for the Gallatin National Forest over 15 months ago, and we have not yet received a response from the Forest Service. Recognizing that problems do exist with the administration of the appeals process, we offer the following recommendations to help correct the unnecessary delays currently being experienced.

First, Congress should monitor closely the implementation of the new Forest Service appeal regulations. The Forest Service claims that the new appeals regulations will solve many of the problems associated with appeals. Congress should ensure they do. If the Forest Service continues to fall behind its deadlines or refuses to make decisions on appeals, Congress should hold the agency accountable.

Second, Congress should investigate whether the resource area analysis process has resulted in unnecessary delays in decisionmaking and what effect these delays have had on timber sale preparation.

Third, the Congress should determine if delays in appeals processing are due, in part, to a lack of funding. If the Forest Service is hampered from responding to appeals in a timely fashion because reviewing officers do not have enough staff support, then additional funding should be made available to provide the necessary personnel.

In closing, the Wilderness Society believes that precluding citizen review of agency decisions as advocated by the timber industry is an unacceptable solution. The appeals process is a valid and functional tool for citizen oversight of Forest Service decisions and has directly resulted in better decisionmaking by the Forest Service. The Wilderness Society urges this committee to deny the timber industry's request to close the door on citizen review.

However, it is clear that the appeals system is not capable of resolving many of the underlying issues raised in appeals. Congress needs to play a more active oversight role over Forest Service implementation of the National Forest Management Act and other legislation. In addition, we urge the Senate Agriculture Committee to exert its jurisdiction over appropriations riders that seek to preclude citizens rights to seek enforcement of environmental laws through the courts and the appeals process.

Thank you for the opportunity to present this testimony.

[Critique of the Southwest Montana Mill Crisis follows:]

CRITIQUE OF THE SOUTHWEST MONTANA MILL CRISIS [1]

[By H. Michael Anderson [2]]

INTRODUCTION

In March 1989, the Montana Department of Commerce issued a study, *The Southwest Montana Mill Crisis,* which examines timber supply shortages in the vicinity of the Gallatin and Beaverhead National Forests. The study focuses on the causes of reduced timber volume under contract available to the Brand S lumber mill in Livingston and the Stoltze mill in Dillon. The study concludes that a breakdown in the Forest Service appeals process is the major cause of supply shortages (p. 5). The authors principally recommend that Congress enact special legislation to mandate implementation of forest plans, set minimum harvest levels, and limit appeals and lawsuits for 3 years (p. 6).

The Montana study's conclusions regarding appeals and recommended legislation are seriously flawed. In fact, appeals have not held up a significant amount of timber sale volume on the Gallatin and Beaverhead National Forests. Recent shortfalls in timber sale offerings on those forests are largely due to other factors, including failure to enact wilderness legislation in Montana and administrative delays in forest plan implementation (resource area analysis). The recommended legislation would not have prevented and will not solve the timber supply problems of the Brand S and Stoltze mills.

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[1] Prepared for Senate Conservation and Forestry Subcommittee Oversight Hearings on Forest Service Appeals, May 18, 1989.

[2] Forest Planning Specialist, the Wilderness Society.

ARE APPEALS THE PROBLEM?

The Montana study's conclusion that appeals are the major cause of immediate timber supply shortages is not supported by the facts. For example, the authors state that "as a result of various appeal actions, about 17 mmbf of planned sales on the [Gallatin] forest were delayed" in fiscal year 1988 (p. 12). However, the Forest Service report appended to the study indicates that only 2.8 mmbf in one sale on the Gallatin were delayed in FY 1988 due to appeals or litigation (p. B.16). The remaining 14.2 mmbf, or more than 80 percent of the shortfall in sales last year, evidently were not sold for reasons other than appeal delays. Overall, appeals have delayed about 17 percent of the Gallatin's timber sale volume in the last 5 years (pers. comm. with Jim Devitt, Gallatin N.F., 5/11/89).

With respect to appeals on the Beaverhead forest, the authors state that "8 sales, affecting 25.6 mmbf of timber . . . had been delayed" in FY 1988 (p. 12). However, the study contains no supporting documentation or references to show that the sales were actually delayed or continue to be delayed by appeals. The Beaverhead appeal summary indicates that all of the seven timber sales appealed in the last 2 years were being promptly reviewed and decided by the Forest Service (p. B.18). According to Forest Service appeals coordinators, all appeals on the Beaverhead have now been decided, resulting in the remand of one sale and the withdrawal of another (pers. comm. with Earl Sutton, Beaverhead N.F., 5/11/89 and Randy Phillips, Region 1, 5/16/89). Litigation is pending on two other timber sales, but no injunction has been issued. Thus, the timber sale volume currently delayed by appeals on the Beaverhead appears to be only a small fraction of the amount stated in the study.

DELAYS FROM LACK OF WILDERNESS LEGISLATION

The single most important factor hampering the Forest Service's timber sale program in Montana is the failure of Congress and the President to enact wilderness legislation. As the Montana study notes, President Reagan's veto of the Montana Wilderness Bill in 1988 prevented the release of about 1 million acres of roadless land designated for entry and development in the forest plans. On the Gallatin forest, where over half of the planned timber program is in roadless areas, "failure to win release of these lands effectively reduces the Gallatin's 21 mmbf ASQ to nearer 10 mmbf" (p. 15).

Indeed, all roadless areas have been off limits to logging for nearly two decades in anticipation of a Montana Wilderness Bill. This has caused the Forest Service to schedule more timber sales in already roaded areas than those areas would otherwise be expected to sustain. Now the agency is finding it increasingly difficult to continue concentrating sales in roaded areas without inflicting serious environmental damage.

Absent legislative release language, the Forest Service has never been able to comply with requirements of the 1982 court of appeals decision, *California* vs. *Block*, concerning roadless area analysis. In 1988, Associate Chief of the Forest Service George Leonard ruled that forest plans are not intended to meet the site-specific requirements of *California* vs. *Block*. Further analysis will need to be performed when particular timber sales and other projects are proposed in roadless areas that have not been released from further analysis by Congress (Idaho Panhandle Forest Plan Decision No. 2130, August 15, 1988).

The problem can be solved by enactment of a Montana Wilderness Bill with standard release language. In States with release language, 94 percent of timber sales offered in released roadless areas were not appealed, according to a 1987 Forest Service report (attachment A). The Forest Service report notes that release language has been effective in minimizing appeals of timber sales in roadless areas.

DELAYS FROM PLAN IMPLEMENTATION

A second cause of the sharp drop in the Gallatin and Beaverhead forests' FY 1987 and 1988 timber sale programs seems to be the new analysis process that the Forest Service has adopted to implement the forest plans. While the Montana study hints at this problem, the authors apparently chose to consider it part of the "appeals process." In reality, delays resulting from the implementation process are basically unrelated to appeals and would not be affected by the authors' recommended legislation.

Following the adoption of forest plans in 1987, the Forest Service decided to institute a new "resource area analysis" (RAA) process in the Northern Region. The process is similar to the "integrated resource management" process pioneered by the Eastern Region in 1986 and adopted by some other regions since then. Essentially, the RAA process is intended to help the Forest Service in selecting, scheduling, budgeting, and evaluating management activities in discrete areas such as watersheds or roadless areas.

The Forest Service has had trouble using the RAA process, resulting in substantial delays in final RAA documents. Since timber sales must await the completion of the RAA's in the areas where sales are planned, as well as completion of normal site-specific project analyses, many sales have also been delayed. Largely in response to timber industry objections, the Forest Service issued national direction early in 1989 to stop the use of "inappropriate midlevel decisionmaking" through the RAA process (2/6/89 memo from James C. Overbay, Deputy Chief, to Regional Foresters, attachment B).

Although the RAA process seems to be moving forward to completion on some areas in the Gallatin and Beaverhead, it has taken much longer than anticipated. This has resulted in a bottleneck of timber sales and has contributed to the shortfall in timber sale volume during FY 1987 and 1988.

WILL SPECIAL LEGISLATION WORK?

The study's authors conclude that the "only viable solution" to the immediate timber supply problem is for Congress to pass special legislation (p. 23). They recommend taking a legislative solution previously adopted for the Mapleton Ranger District and applying it to the Gallatin and Beaverhead forests. However, the proposed legislation would not significantly increase timber sales on the two forests.

Congress initially passed the "Mapleton Rider" to prevent the total shutdown of timber sales on the ranger district in response to a federal court injunction. The rider, which has been attached to the Interior Appropriations bill every year since 1985, is intended to remain in effect until a final forest plan is adopted.

The proposed special legislation has three major elements: (1) mandate to implement forest plans, (2) setting minimum timber sale level, and (3) limiting administrative and judicial review of timber sales. As discussed below, none of these provisions would achieve their objective of greatly increasing timber sale volume in the next 3 years.

1. *Implementing Forest Plans.*—This provision would have no effect whatsoever, since Congress has already mandated that all forest plans be implemented. Section 6(i) of the National Forest Management Act states that all activities "shall be consistent" with the forest plans (16 U.S.C. 1604(i)). Unlike the situation on the Mapleton District, the Forest Service has adopted and is implementing the Gallatin and Beaverhead forest plans.

2. *Minimum Sale Level.*—The folly of setting congressionally mandated minimum timber sale levels has been made abundantly clear in the one case where it was attempted—the Tongass National Forest. A similar proposal for the Bonners Ferry Ranger District in northern Idaho has encountered strong resistance. The Mapleton Rider authorized a *maximum* ASQ, not a minimum mandated quantity, because no forest plan was in effect.

3. *Limiting Appeals and Lawsuits.*—Besides being extremely controversial both locally and nationally, this provision would have little impact on timber sales. As discussed earlier, appeals have caused few delays in timber sales, and litigation has caused no delay. Most delays have resulted from administrative problems in implementing forest plans through the resource area analysis process. The implementation analysis problem would not be affected in the slightest by the proposed legislation.

CONCLUSION

Overall, the Department of Commerce study contains sound information and thoughtful analysis of the timber supply situation in southwest Montana. The continued absence of a Montana Wilderness Act with release language is preventing the Forest Service from selling planned timber sale volumes. However, the authors ignored a second important factor causing recent shortfalls in national forest timber sales: delays in the resource area analysis process. Instead, the authors incorrectly attributed most of the shortfall to a breakdown in the appeals process. This faulty analysis, in turn, led the authors to recommend a special legislative package that would not address the basic problem and consequently would have very little impact on local timber supplies.

[Attachments A and B follow:]

[Attachment A, June 16, 1987]

THE FOREST SERVICE TIMBER MANAGEMENT PROGRAM IN RELATION TO ROADLESS AREAS

Since the enclosed tables include relatively detailed information we have summarized and analyzed some of the more pertinent data as follows:

Table I, Acreage and Potential Timber Productivity of Roadless Areas in States with Wilderness Act Release Language, indicates that there are 6.1 million acres of land available for timber production having a potential annual timber productivity level of 1.2 billion board feet (not including Alaska). Three States contribute 74 percent to the total potential timber productivity: Oregon—410 million board feet; Washington—240 million board feet; and California—237 million board feet. The planned level of timber production will be something less than the total 1.2 billion board feet since portions or all of individual roadless areas will be managed for non-timber values or uses which either preclude timber harvesting or reduce potential timber yields. These management decisions have been made for Forests with completed plans while others await completion. This table does not reflect the decisions in the completed Forest plans in order to provide consistency in the data for all National Forests. Nonetheless, the data does reflect the potential significance of roadless areas in establishing future timber production levels.

Table II, Timber Sales in Roadless Areas for States with Wilderness Act Release language, indicates that there have been *512 timber sales,* representing 2.3 billion board feet, that have been sold in released roadless areas since the enactment of wilderness legislation. During this period, *32 sales* consisting of 402 million board feet, have been appealed or litigated, of which 11 have been resolved. The reasons for the relatively few appeals are two-fold. First, some Forests have not been scheduling timber sales in the more controversial roadless areas pending the completion of Forest plans. Second, they have not been scheduling timber sales in some roadless areas in order to keep their options open in deciding how these lands are to be managed as part of the forest planning process. It is therefore difficult to make any judgments as to how effective the release language has been in California, Oregon, and Washington since these States have only one completed Forest plan. However, the timber sale program to be established in the completed plans for these States will be heavily dependent upon successfully entering those roadless areas which are to be managed for timber production. The data for the remaining States, for which the majority of the Forest plans have been completed, suggests that the release language has been effective in minimizing the number of appeals on roadless area entries. (Table IV provides a more detailed breakdown of the data shown on Table II and also additional information.)

Table III, Planned Timber Sales in Roadless Areas for Idaho and Montana, indicates that a significant portion of the Idaho and Montana timber sale program in the next 10 years is dependent upon the development of those roadless areas to be managed for timber production. Over the next 10 years, 2.0 billion board feet are planned for sale from roadless areas in Idaho. This represents 25 percent of the total 8.1 billion board planned for sale during this period. In Montana, .7 billion board feet are planned for sale from roadless areas in the next 10 years. This represents 12 percent of the total 5.6 billion board feet planned for sale during this period. (The actual volumes for these States will depend upon the harvest levels now being established in the Forest plans.) Recently, the timber sales program in Idaho and Montana has largely been concentrated in roaded areas since appeals have characterized sales planned in roadless areas. For example, there have been 32 timber sales, comprising 201 million board feet, planned in roadless areas in northern Idaho and Montana which have recently been appealed. Furthermore, a number of roadless areas have not been scheduled for entry in order to consider alternatives for their management during the current Forest planning effort. It is apparent from the data shown on Table III that the future of the timber sale program is dependent upon the successful entry of those roadless areas which are to be managed for timber production. The concentration of timber sales in roaded areas cannot continue due to the management requirements, such as dispersion of sale units, set forth in the National Forest Management Act.

In summary, the ability of the Forest Service to meet its timber production goals is heavily dependent upon its success in developing those roadless areas which are to be managed for timber and other resources in accordance with approved Forest plans. This is particularly true of the National Forests in California, Idaho, Montana, Oregon, and Washington. The concentration of timber sales in roaded areas in many high producing Forests in recent years cannot be continued at current sale levels. Therefore, appeals and/or litigation of any magnitude which involve timber sales in roadless areas will have a direct and significant impact on the future timber sale program.

[EDITOR'S NOTE.—Tables referred to in attachment A will not be a part of the printed hearing record.]

[Attachment B]

[WO]

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
Date: February 6, 1989.

Reply to: 1920-2.
Subject: Implementation of Forest Plans.
To: Regional Foresters, NFS Staff Directors.

Some confusion continues to exist between the "analysis" required by the NFMA planning process and the "analysis" required by the NEPA. The purpose of this letter is to clarify the difference so implementation of Forest plans may move more smoothly. We also believe that there is some inappropriate midlevel decisionmaking taking place; i.e., functional analysis and "area analysis." You need to give specific attention to determine if this problem exists within your Region and develop an action plan to remedy the situation if it exists.

Implementation of Forest plans is the process of selecting, scheduling, budgeting, monitoring, and evaluating management practices. Analysis, in addition to that required within the NFMA planning process, may be required at the implementation stage to fully integrate all resources and to evaluate cumulative effects and interconnected actions. This is often referred to as "area analysis" or "opportunity area analysis" which are terms easily misunderstood and therefore confusing. This analysis is not NEPA disclosure of a proposed action; rather it is a management exercise that focuses management attention on established priorities, refines the resource integration objectives of Forest plans, and assesses future budgeting requirements. The NEPA disclosure requirements apply only when we want to implement a defined action.

There are only two levels of decisions in planning for units of the National Forest System. These are (1) approval of the Forest plan and (2) approval of management practices that implement the plan. We suggest reviewing FSM 1922, 1922.4, FSH 1909.12, and the Flathead decision, pp. 4-9 and 63-69. We must avoid introduction of a third level of planning and decisionmaking. Unfortunately, in some cases, forest plan decisions are being reexamined on an area-by-area basis, and additional evaluation of functional programs is being conducted on a Forest-wide basis. We should not rehash decisions that have already been made in the Forest plan. However, if new information or conditions exist, it may be appropriate to reconsider plan decisions and amend the Forest plan. This should be the exception, however, not the rule.

The Regions should evaluate their approach to Forest plan implementation by considering the following:

The Forest plan provides direction for all resource programs, practices, uses, and protection measures through establishment of both Forest-wide and management area specific standards and guidelines. The environmental consequences of establishing this direction are fully documented in an environmental impact statement that meets NEPA requirements. Normally, the Forest plan and EIS do *not* contain sufficient detail to determine which specific activities may be undertaken in a site-specific location. Before these decisions can be made, further analysis may be necessary.

The Forest plan implementation process may be illustrated as follows:

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FOREST PLAN DECISION <---------------> NEPA COMPLIANCE
          |                                   |
          |                                   |
          V                                   |
ANALYSIS AND EVALUATION                       |
          |                                   |
          |                                   |
          V                                   V
PROJECT(S) DECISION <----------------> NEPA COMPLIANCE
                                      (TIERING TO THE PLAN)
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Direction is contained in the Forest plan (management prescriptions, standard and guidelines, and schedule of management practices) to achieve the desired future condition of the National Forest described by the plan's goals and objectives. A full array of proposed management practices is available to achieve this desired future. In addition, actions may be proposed by others outside the Forest Service. Additional analysis and documentation of the proposal are necessary before site-specific decisions are made.

Additional management analysis procedures may be used to assimilate management direction, focus management priorities, refine activity schedules, and assess future management requirements. Forests and Districts may use these analysis procedures to identify the timing and location of individual proposed actions.

The NEPA analysis process begins once these individual proposals have been identified. One or more proposals may be addressed in a single EA or EIS if the proposals represent connected or cumulative actions as defined by 40 CFR 1508.25. The disclosure document must address the direct, indirect, and cumulative effects of the proposal(s). Information developed as a part of the management analysis procedures described in the preceding paragraph may be applicable to the NEPA documentation. In addition, the NEPA analysis of the proposed actions should provide the documentary basis for NFMA finding on consistency, suitability, clear-cutting and even-aged management, and vegetative manipulation. This NEPA analysis and documentation leads to project decisionmaking that fully complies with NEPA, NFMA, and all other applicable regulations.

Questions or comments may be directed to the Land Management Planning Staff.

James C. Overbay,
Deputy Chief.

Prepared Statement of Tony E. Schoonen, Montana Wildlife Federation, Bozeman, MT

Members of the committee, my name is Tony Schoonen. This year, the State of Montana is celebrating its centennial anniversary of admittance to the United States. While many historical celebrations are planned throughout the State this summer, I think this centennial year should be a time when we look not just to the past but to the future as well. I know that when Montana celebrates its 200th anniversary, we want that generation of Montanans to enjoy water as pure, air as clean, wildlife as abundant and forests as rich and diverse as those we know today. I want to assure this committee, from my own experience, that without the active involvement of citizens and citizens' groups in Federal land management issues, this goal will not be achieved.

I have lived in Montana all my life. I was raised in Twin Bridges, a small town near the Jefferson and Beaverhead Rivers. I attended local schools and received my bachelors degree and masters degree in School Administration from Bozeman and Dillon. For 28 years I was a teacher and administrator in the Whitehall and Butte school systems. Although I am now retired, my professional career was dedicated to teaching generations of Montanans the value of the State's natural resource treasures. Throughout my life, I have been actively involved as a volunteer to protect these same resources. I am a past president of the George Grant Chapter of Trout Unlimited in Butte, Montana and the Skyline Sportsmens Club, also of Butte. I have just finished 2 years as president of the Montana Wildlife Federation, a statewide organization representing over 6,000 members and I continue to serve on MWF's Board of Directors.

I have devoted many hours to working on fish and wildlife issues because without constant vigilance, agencies such as the Forest Service will squander our natural resources and give way to the lowest common denominator of commodity and timber production.

In southwestern Montana, where I have hunted, fished, hiked, and camped for over 45 years the Beaverhead, Deerlodge and Gallatin National Forests contain some of the finest big game habitat in North America and the headwaters for some of the greatest trout rivers in the world. The elk herds of the East and West Pioneers, the Gravellies and the Anaconda Pintlers attract sportsmen from across the Nation. Blue ribbon rivers and streams such as the Big Hole, the Beaverhead, the Madison are all enormously productive fisheries and provide thousands upon thousands of recreation days to both fishermen and floaters. These are the truly unique resources found on Montana's national forests, for in the dry and cold climate of the region, timber production is quite limited.

To better emphasize the importance of the blue ribbon trout streams I have just mentioned, my family and I have made a portion of our living from these rivers over the past 29 years. As a float fishing guide and outfitter, I have met hundreds of people from all over the Nation whose main enjoyment was fishing for wild trout in Montana. One of my very first customers was Chief Justice Earl Warren and later Sheldon Coleman and Joe Brookes, just to mention a few.

To emphasize even further the importance of recreation and tourism in Montana, according to the Department of Commerce there are 220 guides and outfitters operating on the Beaverhead and Gallatin National Forests. These outfitters and their families include both hunting and fishing guides who make all or part of their living from the fish, wildlife and scenic resources originating on these two national forests.

We need the appeals process to protect our livelihood. We are not subsidized in any way but rely upon wise management of our forest lands to maintain and enhance the fish and wildlife resources and the scenic beauty that bring millions of tourists and recreationists to Montana every year. These tourists contribute millions of dollars to State and local economies and strengthen small business such as airports and car rentals, sporting goods stores, gift shops, motels, hotels, gas stations, bars and restaurants, and so forth. In this way, our outfitting businesses create and strengthen local economies from the very small towns to the larger cities and create hundreds of additional jobs statewide.

Just as an example—I know that 50 percent of the people sitting on this committee like to fish. Just look at what one fly or lure costs you and multiply that by all the flies and lures that you buy but never use. This gives you an idea of how much one happy fisherman will spend.

Despite the obvious value of our nontimber resources, I have watched the Forest Service promote a timber industry at the expense of both our natural resources and the Federal Treasury for the past 20 years. See insert No. 1: "State forests lose on timber sales." [1] According to the Forest Service's timber sale program information report, the Beaverhead National Forest lost $1,700,000 on its timber program in 1987 alone, while the 1987 Deerlodge report shows losses of $800,000 after expenses were subtracted from timber sale revenues. Even as the government has been losing money on the timber sale programs of most of Montana's national forests we have witnessed a slow but steady degradation of Montana's fish and wildlife resources. Over the last 20 years, hunting seasons have become more and more restricted, fishing opportunities have been reduced, wild lands have been opened up to all sorts of commercial exploitation, and little thought has been given to building a sustainable economy that best utilizes those resources that both Montanans and citizens across the country value most highly: fish and wildlife, clean air and clean water. See insert No. 2: "Toward a State Rural Economic Development Policy."

As groups like the Montana Wildlife Federation and Skyline Sportsmen have sought to protect Montana's wildlife heritage for the next century, the Forest Service appeals process has become an increasingly important tool. While the timber industry has sought to characterize the appeals process as nothing more than a delaying tactic, I think the evidence shows that the appeals process has been an extremely important vehicle for protecting nontimber values from the onslaught of the Forest Service and the timber companies. Indeed, the appeals process has been very important to use in at least two ways. First, MWF and other conservation groups have successfully overturned many decisions that the Forest Service itself found to violate either agency practice or Federal law. Second, it is only after appeals are filed that the Forest Service seems to take citizens' concerns seriously. In several instances, the appeals process has finally provided a forum for serious negotiation on the part of the Forest Service and meaningful compromise between timber goals and fish and wildlife protection. These appeals have not lessened timber harvest as the GAO report shows; indeed, timber harvest has increased dramatically. See insert No. 3: "Some Mills Won't Make It."

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[1] Insert No. 1, "State forests lose on timber sales"; insert No. 2, "Toward a State Rural Economic Development Policy"; and insert No. 4, "Forests Present Contrast in Conflicts" will not be a part of the printed hearing record.

Last year the Montana Wildlife and Skyline Sportsmen were involved in two appeals that I think illustrate how important the appeals process is for protecting nontimber values. In March of 1987, the Skyline Sportsmen, MWF, the Anaconda Sportsmen and the Big Hole Ranchers Association all filed an appeal of the Andrus Timber Sale located on the Dillon Ranger District of the Beaverhead National Forest. In this appeal, we challenged the Forest Service's evaluation of the impacts of the timber sale on water quality, elk habitat and mountain goats. Our statement of reasons noted that the Forest Service had completely failed to address potential cumulative impacts growing out of timber harvest on adjacent private land or of other vigorous Forest Service timber sales in and around the same area. In Andrus Creek, the Forest Service had constructed over 75 miles of roads and harvested over 18 million board feet of timber prior to the Andrus Sale being offered, with additional sales being contemplated within the next 5 years. The piecemeal consideration of impacts accounted for in the Andrus EA simply ignored the environmental consequences of the Forest Service's proposed action, even while some of the most important wildlife habitat in southwestern Montana were being seriously impacted.

Less than a month ago, after taking the Andrus Sale up through the Northern Regional Forester's office to the Office of the Chief, we were vindicated in our appeal. The Chief reversed the Forest Supervisor's decision to offer the Andrus Sale until environmental impacts had been fully evaluated. As I understand the National Environmental Policy Act, it calls for an honest evaluation of environmental impacts. Where the Chief of the U.S. Forest agrees with conservationists that these impacts have not been given adequate consideration, it seems to me that the appeals process has worked exactly as intended.

While conservation groups such as MWF have often found it necessary to vigorously pursue administrative appeals, we have also been ready to compromise and work with the Forest Service where the agency has been honestly willing to discuss our concerns. In 1987, a coalition of conservation groups led by the National Wildlife Federation filed an administrative appeal of the Deerlodge Forest Plan. While most of our organizations had commented on the draft Forest Plan, the Deerlodge Forest had largely ignored our concerns in approving the final Plan. See insert No. 4: "Forests Present Contrast in Conflicts." It was only after an appeal was filed that the agency indicated that it was willing to sit down and seriously address our concerns. The result of this response was a year-long series of negotiations over the Deerlodge Plan, which culminated in a settlement agreement that was signed in March of this year.

I had the opportunity, if you want to call it that, of serving as a member of the negotiating team for the conservation organizations, and while negotiations were long and difficult, it was the first time I felt the Forest Service took us seriously in our complaints about Deerlodge forest management. I have attached a copy of the settlement agreement to my testimony. This agreement illustrates the many concessions that the Forest Service made in order to develop a forest plan that actually responded to fish and wildlife concerns. The Forest Service substantially tightened its methodology for analyzing the impacts of timber harvest on elk and other big game, agreed to adopt formal best management practices to protect water quality, changed its road construction program to better meet nonmotorized recreation objectives, offered additional protection for old growth, and finally, shifted about 50,000 acres out of the commercial timber base to protect important wildlife habitats.

While we certainly congratulate the Forest Service for its willingness to reach the Deerlodge settlement, this settlement became a possibility only after a formal administrative appeal was filed on the Deerlodge Forest Plan.

I could list a dozen other appeals that have been filed over the last few years by MWF or other conservation groups that directly challenged Forest Service timber practices that impacted Montana's fish and wildlife resources. These appeals were honestly undertaken by conservationists and sportsmen not to thwart the timber industry, but rather to protect public resources from being destroyed. While not all conservationists' appeals have been sustained, many have been sustained and have resulted in better resource protection. It seems to me that this is the real test—when the agency overturns its own decisions, clearly the underlying reasons for the appeal were valid. If Congress is serious about protecting the wildlife of the West, the appeals process must remain in place.

In my opinion, if we gave the timber industry all the timber they wanted, they would decimate the timber stands in Montana in a few short decades, much as they did on their own private timberlands. This would not only terminate timber jobs, but also terminate guides and outfitters and decrease income to all related businesses.

Recreationists have long been discriminated against, from the time the first Forest Service budgets were established. There have been some recent increases in the wildlife and range portions of the budget, but the majority of these budgets mandate timber harvest and roadbuilding.

It would be a truly unique twist if Congress reversed this trend in States that have the lowest timber values, such as Montana, and mandated that the budget manage the forests for tourism and recreation, fish and wildlife, with the smallest portion of the budget going for family type loggers and post and pole harvests. Taxpayers would save approximately $15.6 million in timber harvesting alone in Montana.

If I have a single suggestion to improve the appeals process, it would go toward forcing the Forest Service to respond rapidly to administrative appeals from all quarters. I know of several appeals that have been fully briefed, yet have taken a year or more to be decided by the agency, and I know most conservationists are puzzled by the interminable amount of time it takes the agency to respond to even the simplest concerns. So while I think the evidence shows that it is the Forest Service that often causes delays in the appeals process, the timber industry seems to want to punish conservationists for this problem. If this committee or Congress wants to seriously address delays coming from the appeals process, it should look to the agency and not to the public.

Thank you very much for this opportunity to testify.

[Insert No. 3, "Some Mills Won't Make It" follows:]

[Missoulian Editorial—Insert No. 3]

SOME MILLS WON'T MAKE IT

THE INDUSTRY'S OWN EXPANSION HAS WORSENED SUPPLY PROBLEM

Citing a shortage of timber, the Brand S Corp. sawmill in Livingston temporarily halted lumber production last week. F.H. Stoltz [Stoltze] Land & Lumber Co.'s sawmill in Dillon has been mostly idled since February, apparently for the same reason, while Darby Lumber has struggled for months under an on-again-off-again schedule dictated by its halting supply of logs. In fact, throughout Montana, wood products manufacturers are complaining of a timber famine of drastic proportions.

Ironically, the complaints follow the three largest timber harvests of the decade from the national forests of Montana and northern Idaho. U.S. Forest Service timber sales in the Northern Region have averaged 1.035 billion board feet since 1986, compared to a 1979–88 average of 930 million board feet. Timber harvests from all sources—federal, State and private lands—have increased throughout the 1980's. In Montana alone, loggers harvested nearly 1.38 billion board feet of timber from all sources in 1987, nearly 260 million board feet more than in 1977, when the industry was in its heyday.

Despite the increase in supply, there's an unmistakable shortage of timber. Why?

The timber industry blames an unresponsive Forest Service for not selling enough timber and appeals filed by conservationists for obstructing the flow of timber to market. Conservationists say log shortages stem in part from the veto of last year's Montana wilderness bill, which would have opened an additional 4 million acres of nonwilderness lands for potential logging. Both sides agree that Champion International Corp. and Plum Creek Timber Co. are cutting their privately owned forests faster than new trees grow, a practice that promises to reduce the total amount of wood available in the region and guarantees the industry will become increasingly dependent on national forest timber sales.

But there's another factor that almost nobody's talking about; the industry itself.

Montana's timber industry has grown significantly in its ability to consume timber. In portions of the State, the mills have simply overbuilt—they've outgrown their supply of timber.

Plum Creek's plywood plant in Evergreen is a good example of the trend: In 1979, the mill had a capacity to produce 80 million square feet of plywood a year. Today, through modernization, the mill has increased its annual production capacity to 140 million square feet. Similar changes have taken place throughout the industry.

There are no reliable current statistics on the industry's milling capacity statewide. But the University of Montana Bureau of Business and Economic Research estimates that lumber milling capacity in Montana's nine westernmost counties increased 19 percent—nearly 230 million board feet—between 1981 and 1987, from 1.18 billion to 1.41 billion board feet.

To put the increase in perspective, it's equivalent to nearly six times the amount of timber needed annually to keep Stoltz's [Stoltze's] idled Dillon mill in operation. The growth in capacity has taken place in Missoula, Lake, Flathead, Lincoln, Sanders, Mineral, Granite, Powell and Ravalli Counties, where perhaps four-fifths of Montana's wood products are produced.

The quantity of timber processed by sawmills may be more meaningful than capacity, since factories almost always operate at less than their theoretical capacities.

The total amount of timber processed by sawmills in those same nine counties soared 31 percent from the poor-market year 1981 to boom-market 1987. Although the volume of timber processed in 1987 was nearly 10 percent greater than in 1977, another good year, there were nearly 1,000 fewer jobs in the industry.

The increase in timber processing and decline in mill employment are closely related.

A 1988 study commissioned by the Missoula Economic Development Corp. cited "spectacular gains in output" among wood products firms. The study attributed the gains to mill-improvement projects inspired by the industry's sharp, 5-year recession beginning in 1980. When the bottom fell out of the market for wood products, companies were forced to become more efficient to survive. Some of the efficiency came in the form of economies of scale.

Installing state-of-the-art milling equipment has enabled wood products companies to produce more wood products with fewer workers. Selected mills surveyed by UM's BBER reduced their production costs 29 percent between 1979 and 1986; wage costs dropped 35 to 50 percent at the same time.

A change in the kind of lumber being milled is also a factor in the industry's growing demand for timber. Where high-value boards milled from large, old-growth timber once were the industry's bread and butter, the depletion of old-growth timber has prompted many mills to shift to the production of lower-value studs and dimension lumber, mostly milled from small-diameter lodgepole pine. It takes more of the lower-value lumber to make as much money as mills once earned from higher-quality boards, so there's a built-in incentive for stud-and-dimension mills to increase capacity.

The enhanced ability to process timber may help individual mills thrive, but it also makes it tougher for competing mills to stay in business without becoming more efficient, too. With scores of mills improving efficiency and stepping up production, Montana's finite supply of timber is stretching thin.

The growing demand for timber has prompted mills to look beyond their traditional territories and travel farther to obtain their raw material. Many mills can afford to spend more to transport logs because they're spending less for sawing the wood into lumber. As a result, the competition for timber has grown more intense, with mills invading one another's traditional territories like never before. Brand S in Livingston, for example, once obtained its logs mostly in and near the Gallatin National Forest, but now competes with Missoula mills for some Lolo National Forest timber sales.

With the industry's expanded horizons and increased appetite for timber, Montanans must accept the unsettling truth: The wood products industry is in the midst of industrial Darwinism, a life-and-death struggle where only the fittest will survive. Among the communities dependent on the industry, only those that diversify their economies are likely to prosper.

Resolution of timber-sale appeals and passage of a wilderness bill that releases for possible logging suitable roadless lands now tied up by Congress will help ease the transition and possibly save individual mills. But nothing will alter the law of supply and demand.

How many mills will fail? Which ones? How soon? Those are open questions. The only certainty is that some of Montana's mills are doomed.

[Attached material follows:]

SETTLEMENT AGREEMENT

BETWEEN THE DEERLODGE NATIONAL FOREST, AND THE NATIONAL WILDLIFE FEDERATION, ET AL. AND THE INTERMOUNTAIN FOREST INDUSTRY ASSOCIATION ET AL.

For the purposes of resolving the Deerlodge Forest Plan Appeal (#2169 and #2205) without the necessity for further proceedings, the Regional Forester, hereinafter known as "Forest Service," and National Wildlife Federation, Montana Wildlife Federation, Skyline Sportsmen, George Grant Chapter Trout Unlimited, Anaconda Sportsmen, Montana Wilderness Association, Deerlodge Forest Defense Fund, and Basin Creek Big Game Association (National Wildlife Federation, et al.) and the Intermountain Forest Industry Association (IFIA), Eagle Stud Mill, Longtree Timber, Inc., F. H. Stoltze Land and Lumber Company, Louisiana-Pacific Corporation, Brand S Corporation, and Pyramid Mountain Lumber Co. (Intermountain Forest Industry Associaiton, et al.), hereinafter known as "appellants", agree to the following:

I. FOREST SERVICE ACTIONS:

A. The Forest Service agrees to the following items of change to the Deerlodge Forest Plan as necessary to incorporate the terms of the Agreement as set forth below in this Section I. A.. The Forest Plan amendment process, where called for by the changes agreed to, will be conducted in compliance with all applicable law including NEPA, and NFMA, and with appropriate public involvement.

1. Establish the Fleecer Mountain Wildlife Management Unit consisting of Hunting Recreation Opportunity Geographic Areas (HROGA) 20 and 21. Present land designations within the Fleecer Mountain Wildlife Unit will remain except for those lands designated as Management Area E-1. All E-1 lands within the Fleecer Mountain Wildlife Unit (18,870 Acres) will be designated as Management Area C-13. The goals and management standards for Management Area C-13 are set out in Appendix 1 attached to this agreement.

2. Adjust certain management areas to better reflect important fish and wildlife resources. These adjustments are defined in a narrative (with maps) labeled Appendix 2 attached to this agreement.

3. Change Forest Plan Appendix N as follows:

   The HROGAs set out in Forest Plan Appendix N establish certain elk effective cover objectives. These objectives shall be changed as indicated in the following tables. Where the existing EEC is below the new EEC objective, no decrease in EEC will be permitted except as provided in the last paragraph of Section I.B.5 below.

The Deerlodge Forest shall maintain, at a minimum, the following elk effective (EEC) standards:

HROGA	Forest Plan EEC	Existing EEC	New EEC
1	80	95	80
2	60	49	60
5	80	71	80
6	70		70
7	70		70
8	60	67	67
9	80		80
10	70		70
11	100		100
12	60		Status quo unless < 60
13	60	66	66
14	100		100
15	100		100
16	60	50	60
17a	50	41	50
17b	50	35	50
18	80	65	80
19	60		Status quo unless < 60
22	60	53	60
23	50		Status quo unless < 60
24	100		100
25	80		80
26	70		70
27	60	48	60
28	60		Status quo unless < 60
29	60	47	60
30	50	37	50
31	100		100
32	60		Status quo unless < 60
33	60		Status quo unless < 60
34	100		100
35	60		Status quo unless < 60
36	60	72	70
37	60	59	60
38	60	57	57
40	70	74	70
41	80	79	80
42	60	66	66
43	50	52	52
44*	60		Status quo unless < 60
45	80		80

* In HROGA 44, the ECC cover standard may be modified because of a Mountain Pine Beetle infestation. Should Mountain Pine Beetle infestation levels develop toward epidemic levels, the Forest Service can elect to proceed with cover objective changes in areas that become threatened. Appellants will be notified of potential EEC changes due to insect infestations 9 months in advance of the decision. Any changes in EEC designations will be reviewed through the NEPA process.

The changed objectives on the following areas represent long-term goals which will be accomplished through cover regeneration and may not be achievable in the next 10-15 years. However, there will be demonstrable progress made during the life of the Forest Plan. In all HROGA's Elk Habitat Units where the existing EEC is below 70 percent, no decrease in EEC will be permitted.

HROGA	*Forest Plan EEC*	*Existing EEC*	*New EEC*
3a	50	55	60
3b	50	57	60
4a	50	57	70
4b	50	59	70
4c	50	72	70
17c	50	50	60
17d	50	62	70
20	70	81	80
21	60	66	70
39	60	86	70

4. Old growth on the Deerlodge National Forest is a limited resource, which is not currently well defined. Although lodgepole pine is an extensive timber species on the Deerlodge National Forest it does not provide old growth habitat for dependent wildlife species. Old growth on the Deerlodge National Forest consists of; spruce/subalpine fir old growth type, the whitebark pine/limber pine old growth type and the douglas-fir/ponderosa pine old growth type. These old types are limited in range and distribution. The size, age class, range and distribution of these types are currently unknown.

   The Deerlodge National Forest agrees to study its old growth, to display its range and distribution, and to develop a standard definition and prescription for management by July 1, 1991. The final management guidelines will include a standard for retention of old growth in third order drainages. Any change in standards will be considered a modification of this agreement and Section III.H. will apply. In the interim, section 5, 6, and 7 below will apply.

5. The Deerlodge Forest Plan will be supplemented at page II-26 to provide the following additional criteria for old growth:

   (a) The amount and distribution of old growth will be used to ensure sufficient habitat for the maintenance of viable populations of existing native and desirable non-native vertebrate species including two old growth indicator species, the pine marten and pileated woodpecker. Diversity of plant and animal communities and tree species will be provided on the Deerlodge National Forest, in accordance with 36 CFR 219.26.

   (b) Stand conditions that qualify as old growth will vary by habitat type and landform. Criteria to consider for identifying old growth include:

   - large trees, generally 15 per acre greater than 20 inches dbh for species other than lodgepole pine and 6 inches for lodgepole pine;
   - canopy closure at 75 percent of site potential;

- stand structure usually uneven-aged or multistoried;

- snags, generally 1.5 per acre greater than 6 inches dbh and .5 per acre greater than 20 inches;

- more than 25 tons per acre of down material greater than 6 inches diameter;

- heart rot and broken tops in large trees are common; and

- lichens and mosses are present.

(c) Old growth will be mapped and displayed by third order drainage on maps included in all timber sale and/or road project environmental assessments. Mapping of old growth will occur prior to any timber harvest or road construction in any third order drainage. Long rotations will be prescribed to meet old growth requirements on selected suitable timberlands in Management Areas E1, E2, E3 and F1. In the alternative the Forest Service may assign old growth timber to nontimber prescriptions.

(d) Sanitation and salvage sales and firewood permits will not be permitted in old growth needed to meet the Forest old growth standard except for health or safety reasons at developed sites.

6. Until item 4 is completed the Standards and Guidelines for Management Area E1, E2, and E3 will be refined to include the following:

   - Old growth stands, 40 acres and larger, will be distributed over the management area. About 10 percent of Management Area E1 in each third order drainage will be maintained in old growth. 40 acre stands of old growth generally represent a minimum size; where available, old growth will be maintained in larger blocks of 100 to 300 acres. Old growth corridors linking blocks of old growth will be provided where possible. Such old growth corridors will be provided by coordinating management activities with activities in adjacent management areas and with intermingled unsuitable (for timber production) management areas.

7. Until item 4 is completed the Standards and Guidelines for Management Area F1 will be refined to include the following:

   - Old growth will be available to maintain viable wildlife populations of old growth dependent species. The effect of timber harvest on old growth amount, location and kind will be documented in the NEPA document on timber sales or road construction projects.

8. The soil and water monitoring requirements on Forest Plan page V-14 will be footnoted as follows: "The checklist from the R-1/R-4 "Timber Management - Sediment - Fish Issue - Monitoring Needs and Guidelines" will be used to evaluate applications and effectivenes of Best Management Practices.

9. Motorized Travel Management:

The Deerlodge Forest Plan will be implemented in light of the following motorized travel management policy.

To achieve the objectives of Appendix N of the Forest Plan, needed travel restrictions will be applied sequentially over time and on a geographical/area basis. Decisions on restrictions will be supported by a planning process which starts with the assumption that no motorized access exists, and proceeds with incremently increasing motorized access. In making decisions on access restrictions priority will be given first, to big game habitat and security needs and second, to hunter access needs. Decisions to restrict or close roads will be made and implemented consistent with 36 CFR 261.

The Deerlodge National Forest arterial transportation system is complete in terms of multiple use objectives. New roads built after the date of this agreement will be closed to motorized use by the general public during and after timber harvest unless the Forest closes a similar amount of existing road in the same area. District Rangers or the Forest Supervisor may make a determination in the NEPA document on the road and/or associated timber sale that the demand for firewood gathering in the area is high. If such a finding is made, a road may be opened for firewood gathering in July, August and September for the first year after the sale is completed. After this period a gate or other barrier will be installed and maintained until vegetation on the roadbed or the roadbed itself provides a barrier sufficient to preclude motorized use.

10. Road Design, Construction and Reclamation

All Forest local roads built primarily for timber harvesting and associated post harvest activities shall be "low-volume roads" and shall be constructed using the least restrictive specifications available that will prevent resource damage, protect the environment, and meet the Forest BMP's. Least restrictive is defined as temporary or Standard Specification Section 299 Standard.

To meet the requirement of the above paragraph the Deerlodge National Forest will use engineering practices that reduce the need for intensive survey, design, and construction engineering methods on those lands where risks are low. The use of flag line survey and design with construction by Standard Specification Section 299 (Appendix 5) will be emphasized. Where risk to water quality are high more intensive methods may be used. Methods of survey, design, and construction will be a discussion item in the authorizing NEPA document.

Other than outlined in the second paragraph higher standard roads may also be constructed only if the authorizing NEPA documents have identified that future land management activities, are necessary to implement the Forest Plan and that a higher standard road is necessary to meet the objectives.

Roads built primarily for timber harvest without documented future management activities will be developed for short-term service and will be eliminated as transportation facilities upon completion of the specific management activity for which they were constructed. Such roads will be reclaimed by revegetating the road prism to effectively control erosion and render the road impassible to motorized vehicles.

Any decisions to build higher standard roads and to close but not revegetate a road because recurrent management activities are planned will be documented in the NEPA document prepared on the road and/or associated timber sale. The NEPA document will identify the management activities planned and provide documentation showing that total transportation costs (construction, hauling, and maintenance) will be less expensive than constructing short-term low volume roads and reclaiming them. Absent such documentation the road will be closed and revegetated.

This provision will apply to all timber sale and road construction contracts signed after July 1, 1989. Any such approved NEPA document will be amended to include this provision.

11. The Deerlodge National Forest will incorporate Best Management Practices (BMP's) in Appendix B of this Agreement into the Forest Plan as Appendix U (unbound). These BMP's represent the minimum requirements which should be applied on all timber sales and road construction projects. In the event that additional steps are needed to protect water quality, the Deerlodge National Forest shall apply other BMP's including those developed and adopted by the Regional Forester for use in the Northern Region.

12. The Deerlodge National Forest will accelerate a study of the appropriateness of the Allowable Sale Quantity in its Forest Plan. The study will consider the supply needs of the local mills and timber availability from all lands in the market area of the local mills. The study will also analyze opportunities to increase timber supply levels consistent with other resource objectives specified in the Deerlodge Forest Plan.

    If the study demonstrates a need for change in timber supply levels, the Forest Service will propose alternatives, some of which will, satisfy these needed changes.

    The review will be completed by August 13, 1991.

    All parties to this Settlement Agreement will be active participants in the study design and study process and reserve the right to appeal any decision made on ASQ as a result of this review. The study will be an open public process and may result in amendment to the Deerlodge National Forest Plan.

13. The Deerlodge Forest will annually inventory all lands and assess the extent and spread of Mountain Pine Beetle and other major insects and deseases which threaten resources.

    Timber harvesting instead of fire, will be used where Forest Plan Objectives allow, as a means of controlling buildup of fuels and reducing fire hazard.

14. The Deerlodge National Forest will establish and maintain a 10-year timber sale action plan which meets the ASQ levels under the Forest Plan.

B. The Forest Service also agrees to the following action:

1. The Deerlodge National Forest agrees that, after the Alder Niles and Upper Willow Timber Sales, no further sawlog timber sales will be scheduled in the Upper Willow Creek drainage during the life of this Plan.

2. The Deerlodge National Forest intends to implement range management practices under the Forest Plan Implementation process. The area of analysis will be large enough to determine and evaluate the reasonably interconnected actions and the effects, including cumulative effects. Until area analyses are scheduled and completed it may be necessary to complete the update of allotment management plans that are currently in process and on priority allotments that need attention sooner. The NEPA process will be followed and the documentation may be an environmental impact statement, an environmental assessment or a categorical exclusion depending on the significance of effects. Public involvement will be part of the process. At a minimum each area analysis and resulting Allotment Management Plan (AMP) will:

   a. Provide maps which clearly display ecological status of range on the Forest;

   b. Provide maps which clearly identify important big game seasonal ranges, important big game calving and nursery areas and all big game winter ranges.

   c. Examine a reasonable range of alternative stocking rates. Potential benefits to wildlife from reductions will be fully examined, and the economic efficiencies of various stocking levels will be set out.

   d. Range improvements which benefit wildlife will be emphasized. In key wildlife habitat, range improvements which benefit wildlife will be emphasized. In non-key wildlife habitat, range improvements which benefit livestock and have a neutral or positive effect on wildlife will be favored. No range improvements, which individually benefit livestock but in the context of all (existing and planned) improvements on an allotment have a net negative impact on wildlife, will be approved.

   e. All alternatives examined in the Area Analysis or AMP NEPA process will identify and evaluate the effects of the alternative on important elk seasonal ranges. Livestock "on-dates" and "rotational" dates will be modified to reduce seasonable displacement of elk. Key habitat for big game such as calving and nursery areas, winter ranges or other key wildlife habitat will be protected and any conflicts with livestock grazing on these key habitats will be resolved in favor of wildlife, consistent with the Forest Plan. A schedule will be set out for rehabilitation of degraded riparian areas.

   All alternatives examined in the Area Analysis or AMP process will seek to reduce livestock/wildlife conflicts on key habitat for big game within three years after the decision document is implemented. All alternatives will have a goal of maintaining sufficient grassland habitat in usable condition for nesting, brood rearing, and other habitat needs of ground nesting wildlife during the season of need consistent with wildlife management plans. Other practices consistent with these objectives may be developed by the Deerlodge Forest.

f. It is the policy of the Deerlodge National Forest that AMP's will not be modified through annual operating plans unless exceptional circumstances occur. Wildlife and other resource values will be taken into account in any decision to modify an AMP through the annual operating plan.

The Forest will provide the appellants a copy of the current RAMIS report.

g. Items a. through e. above represent agreements on forms of analysis and documentation. The statements defining priorities between wildlife and livestock are consistent with Forest Plan direction.

3 Include the Painter (1980) curve that relates cattle density to elk use. This curve will be used along with Regional and Forest handbooks and guidelines for allotment analysis. Based on field experience and research, the Deerlodge may modify this curve for use in assessing cattle/elk relationships. The Deerlodge shall establish a minimum cattle/elk effectiveness threshold on each HROGA indentified in Appendix N of the Forest Plan.

4. The Deerlodge Forest hydrologist and Appellants' consultant shall examine the proposed timber sales and develop a program whereby turbidity measurements will be taken on certain timber sales. This program will be agreed upon by December 31, 1988. The Deerlodge National Forest agrees to analyze and compare the results of the R-1/R-4 checklist and the turbidity monitoring by 1991 to determine whether the turbidity measuring should continue.

5. Appendix P of the Deerlodge Forest Plan shall be interpreted and implemented as follows:

For purposes of calculating elk habitat effectiveness (HE), the Deerlodge National Forest agrees to assume that all open roads in an analysis area will exert their full (100 percent) effect on HE unless the Forest Service has collected a minimum of two years of actual road use data, including data from two full big game hunting seasons. Road impacts may be discounted as set out in Appendix P (30 percent for secondary roads and 95 percent for primitive roads), once the Forest Service has collected data that supports such adjustments. Information on road use, and HE calculations based thereon, shall be set out in the NEPA document prepared on any proposed timber sale or road construction project.

For the purpose of calculating HE as set out in Appendix P, the Deerlodge Forest agrees that closed roads may have a negative impact on HE. The NEPA document prepared on timber or road projects shall analyze and assess the negative impact of closed roads and make a project specific determination on how the effect of such closed roads shall be integrated into HE calculations. This determination will be the result of a joint decision between the Forest Service and the Department of Fish, Wildlife, and Parks. Roads that have been revegetated to the point that they are impassable to two or four wheel vehicular travel may be valued as having no effect on HE. This analysis shall be fully disclosed in the NEPA document covering the timber or road project.

Further the Deerlodge National Forest will cooperate with the Montana Department of Fish, Wildlife, and Parks in setting and meeting wildlife population objectives.

Roads which when left open exceed the road density maximums for a specific HROGA as defined in Forest Plan Appendix N, but which are desired to be left open by the consensus of the Montana Department of Fish, Wildlife, and Parks, the Forest Service, and appellants, shall be allowed to remain open and will not be considered as open roads in future HE calculations.

The Deerlodge National Forest agrees that closed roads used by hunters increase the vulnerability of elk during the hunting season. However,, all parties agree that the "Habitat Effectiveness Model" is not the appropriate place to analyze these effects. The recent regional task force including; Idaho Fish and Game, Montana Department of Fish, Wildlife and Parks, Region Biologists, Montana University and Montana State University, is developing a strategy to deal with hunter opportunity, elk vulnerability and elk management in light of the short falls of current analysis techniques. If the task force produces a methodology for managing the elk resource, the Deerlodge National Forest agrees to adopt this strategy subject to complying with III.h.

6. Management Area J-2 contains the BPA 500 KV Powerline. When the line is no longer needed or used, the line (towers, conductors, etc.) will be removed and reclaimed, and roads being used solely to access tower sites will be reclaimed to contour and revegetated. The management of the line corridor will be the same as the management area(s) it passes through. Rehabilitation of the corridor will entail that work necessary to meet the Forestwide and specific management area Goals.

7. The Forest will inventory and map noxious weed infestation within one year of the date of this Agreement. Appellants will be supplied with a copy of this inventory. Where the Forest proposes new road construction it will document the presence of noxious weeds and the risk of infestation in an uninfested area. The Forest will consult with the Montana Department of Agriculture or local weed board on a control program. The NEPA document prepared on all new timber and road construction projects will evaluate and discuss the potential for noxious weed infestation and expansion, review option for control, and review option for cost of containment.

8. Appendix 3 contains the Deerlodge National Forest approach to facilitating public participation in our decision making process. The process step will be followed for each NEPA decision made by the Forest.

II. APPELLANT ACTIONS:

A. The National Wildlife Federation et al. agrees to hereby withdraw their appeal (#2169) of the Deerlodge Forest Plan, EIS and Record of Decision. The National Wildlife Federation et al. agrees to notify the Chief of the Forest Service of the withdrawal of their appeal.

B. IFIA WITHDRAWL CLAUSE —

C. Appellants agree not to appeal, seek a stay or otherwise attempt to block the following timber sales: Alder Niles, Upper Willow and Happy Creek.

D. The appellants agree to participate to the extent practicable in all steps described in Section I above, provided that the Forest Service provides the appellants actual notice at the stage where participation is appropriate.

E. The appellants agree not to initiate or pursue any further direct appeal or judicial review of the Deerlodge Forest Plan, EIS. or Record of Decision dated September 23, 1987 or initiate or pursue any appeal or judicial review of the amendments necessary to effect the terms of this Agreement as described in Section I. above.

F. The appellants reserve any rights to initiate and pursue appeal or judicial review of any future Forest Service actions, including, but not limited to, any future amendments or revision of the Deerlodge Forest Plan, except the amendment necessary to effect the terms of this Agreement.

III. OTHER PROVISIONS:

A. The Forest Service and the appellants agree that this agreement binds them only as provided herein and is entered into for the purpose of settling their appeals of the Deerlodge Forest Plan only, and for no other purpose.

B. The Forest Service and the appellants agree that in the event the appellants or their representative or successor initiates or pursues further direct appeal or judicial review of the Deerlodge Forest Plan, EIS, or Record of Decision dated September 23, 1987 or initiates or pursues appeal of judicial review of the amendment undertaken to effect the terms of this Agreement, or in the event the Forest Service fails to amend the Forest Plan as provided herein, this Agreement shall be null and void and all obligations under it discharged.

C. The Forest Service and the appellants agree that if any part of this Agreement shall be determined unlawful by a court of competent jurisdiction, all other lawful terms shall remain in force, unless the entire purpose of the agreement is frustrated hereby.

D. The Forest Service and the appellants agree that any other appellant may elect to join this Agreement by mutual consent to the parties to this Agreement. Signature of this agreement by any other appellant shall bind the appellant as if the appellant were a party of this Agreement. This Agreement shall, however, continue in full force and effect between the Forest Service, the Intermountain Forest Industry Association, et al. and the National Wildlife Federation et al., notwithstanding any action by another appellant.

E. The Forest Service and the appellants agree that any intervenor or third party having an interest in this appeal may elect to join this Agreement. Signature on this Agreement by any intervenor or third party, or authorized representative thereof, shall bind the intervenor or third party to the same terms as the appellant.

F. The Forest Service and the appellants agree that this Agreement shall terminate upon revision of the Deerlodge Forest Plan pursuant to 36 CFR 219.10(g) (1982), or succeeding regulations. In addition, the Forest Service and the appellants agree that in the event of a ruling by a court of competent jurisdiction or a final decision by the Chief of the Forest Service or senior official of the Department of Agriculture which remands the Deerlodge National Forest Plan, the purpose of this Agreement is frustrated thereby. In such event, this Agreement shall terminate.

G. The Forest Service and the appellants agree that this Agreement is subject to any valid existing rights of entities who are not parties to this Agreement.

H. The Forest Service and the appellants agree that this Agreement may be modified by mutual consent of the appellants and the Forest Service.

I. The Forest Service and the appellants agree that this Agreement shall be made part of the record in appeal #2169 and #2205 of the Deerlodge Forest Plan.

J. The Forest Service and the appellants agree that all questions pertaining to appellant's entitlement to costs and attorney's fees and the amounts thereof are specifically reserved for subsequent resolution either by the parties or by a court of competent jurisdiction. The Forest Service and the appellants do not admit to any liability for any such fees or costs alleged by any party.

K. The Forest Service and the appellants agree that this Agreement applies only to the Deerlodge National Forest. This Agreement shall not be evidence of any admission or agreement by the Forest Service with any allegations raised by any appellants or intervenors in this appeal, nor evidence of any agreement or admission by any appellant to any allegation raised by the Forest Service or intervenors.

L. The Forest Service and appellants agree that, in the event of future differences between any of the parties regarding management decisions on the Deerlodge National Forest, the parties will, in good faith, first persue resolution through the collaborative negotiations process.

In the event of disputes brought to bear by parties outside this agreement, but having a potential effect on the agreement, the signators to this agreement will notify each other and collectively determine who would most effectively seek resolution with the outside party. Resolution will first be sought using the collaborative negotiations process, and may or may not require further involvement between parties to this agreement.

M. This Agreement must be used in conjunction with the Forest Plan. Nothing in this Agreement effects other provisions of that Plan. If, during Forest Plan implementation, it is determined that the best way to achieve prescription for a Management Area does not totally conform to a management prescription standard, the Forest Supervisor may amend that standard for a specific project. Such site specific amendments (CFR 219.10(f) and the rationale for the changes must conform to NEPA requirements.

N. The following definitions apply to this agreement.

- Area Analysis/Forest Plan Implementation - see document "Our Approach" USDA, Forest Service, Northern Region, 1988.
- ASQ - The quantity of timber that may be sold from the area of suitable land covered by the Forest Plan for a time period specified by the Plan. This quantity is usually expressed on an annual basis as the "average annual allowable sale quantity".

- BMP's - Three definitions are presented. None are in conflict.

  Forest Plan Definition - The set of practices in the Forest Plan which, when applied during implementation of a project, ensures that water-related beneficial uses are protected and the State water quality standards are met. BMP's can take several forms. Some are defined by State regulation or memoranda of understanding between the Forest Service and the State. Others are defined by the Forest indisciplinary planning team for application Forestwide. Both of these kinds of BMP's are included in the Forest Plan as Forestwide Standards. A third kind are identified by the interdisciplinary team for application to specific management areas; these are included as Management Area Standards in the appropriate management areas. A fourth kind, project level BMP's are based on site specific evaluation and represent the most effective and practicable means of accomplishing the water quality and other goals of the specific area involved in the project. These project level BMP's can either supplement or replace the Forest Plan standards for specific projects.

  EPA Definition - BMP's are methods, measures or practices to prevent or reduce water pollution, including, but not limited to, structural and non-structural controls, operation and maintenance procedures, other requirements and scheduling and distribution of activities. Usually BMP's are applied as a system of practices rather than a single practice. BMP's are selected on the basis of site-specific conditions that reflect natural background conditions and political, social, economic, and technical feasibility.

  Forest Service Handbook Definition - BMP's are a practice or a combination of practices, that is determined by a State (or designated area-wide planning agency) after problem assessment, examination of alternative practices, and appropriate public participation to be the most effective, practical (including technological, economic, and institutional considerations) means of preventing or reducing the amount of pollution generated by nonpoint sources to a level campatible with water quality goals (40 CFR 130.2(q)).

- Collaborative Negotiation Process - This is a form of dispute resolution which emphasizes interest satisfaction over issue resolution. Collaborative Negotiations has its roots in "integrative bargaining". Philosophically as well as practically, collaboration encompasses the belief that the interests of one party will not be satisfied, at least to some degree. Or, stated differently, every proposal for a solution is intended to integrate the primary self interests of all disputants. Collaborative Negotiations acknowledges the distinction between interest based bargaining vs. issue-based bargaining and principle based bargaining vs. position based bargaining. Collaborative Negotiations further acknowledges that, unless disputants are only concerned with acquiring a loose conceptual agreement, issues must always be identified and addressed. Position bargaining is not discarded but simply is modified to assure that interest satisfaction is the motivation, goal, means and ends if equitable, practical, and durable settlements are to be developed and maintained.

- Road Prism - The area of disturbed soil resulting from road construction activites. It generally includes the area between the top of the cut slope and the toe of the fill slope.

- Section 299 Composite Roads - See Appendix A.

SIGNATURES

INTERMOUNTAIN FOREST
INDUSTRY ASSOCIATION
DATE

EAGLE STUD MILL
DATE

F.H. STOLTZE LAND
LUMBER COMPANY
DATE

LONGTREE TIMBER,
INCORPORATED
DATE

MONTANA WILDLIFE
FEDERATION
DATE

SKYLINE SPORTSMEN
DATE

GEORGE GRANT CHAPTER
TROUT UNLIMITED
DATE

DEERLODGE FOREST
DEFENSE FUND
DATE

RICHARD J. CALL
ACTING FOREST SUPERVISOR
DATE

LOUISIANA-PACIFIC
CORPORATION
DATE

BRAND S. CORPORATION
DATE

PYRAMID MOUNTAIN
LUMBER COMPANY
DATE

NATIONAL WILDLIFE
FEDERATION
DATE

BASIN CREEK BIG
GAME ASSOCIATION
DATE

ANACONDA SPORTSMEN
DATE

MONTANA WILDERNESS
ASSOCIATION
DATE

JEFFERSON VALLEY
SPORTSMEN
DATE

APPENDIX 1

MANAGEMENT AREA C13
District Acres
Deer Lodge - 0
Jefferson - 0
Philipsburg -0
Butte - 18.870
TOTAL - 18,870

MANAGEMENT AREA C13

This Management Area lies only in the Fleecer Area of the Butte Ranger District (see attached map).

The area is important elk winter range. It provides late fall security cover for elk during hunting season, and is important summer range and elk calving habitat. This area also provides season long habitat for mule deer and moose. This management area contains resource characteristics of both C1 and C4.

GOALS

To provide current levels of hunter recreation opportunity and elk habitat values by; maintaining adequate levels of hiding cover on critical security areas. and optimizing conditions on elk calving areas, summer range and forage and thermal cover on elk winter range.

To emphasize management direction in Appendix (N) as evaluated by Appendix (P).

To maintain or enhance moose, mule deer and other wildlife habitat to the extent that critical security areas, calving areas, and key summer elk habitats are not deminished.

To permit livestock grazing under approved allotment management plans which include rest rotation grazing systems designed to maximize forage quality and availability for elk on both summer and winter range.

To permit timber harvest on an unscheduled basis when adequate regeneration has occurred in the Fleecer Complex.

To conduct timber harvest to diversify habitats and to maintain or enhance big game spring summer or fall habitat. (All timber projects will have concurrence of the local Montana Department of Fish, Wildlife, and Parks biologists to assure meeting goals of the area. Such concurrence will be documented in the NEPA document).

Element	Standards
	(Forestwide management direction of Chapter II also applies).
Recreation	Permit a variety of dispersed motorized and nonmotorized recreation. Support these uses by constructing trails and trailhead facilities. Motorized access will comply with the objectives in Appendix (N). Maintain existing trails and facilities. VQO's will tend toward partial retention (see Figure II-4).

Wildlife

Use wildlife habitat improvement practices such as travel management and prescribed fire, and tree cutting to maintain and/or enhance the quality of forage and security cover.

Base travel restrictions on Hunting Opportunity Objectives (Appendix N). Incorporate wildlife and fish values into project plans according to Forestwide wildlife standards and the goals of this management area.

Range

Allow livestock grazing. Modify grazing systems, schedules, practices, and developments to insure compatibility with spring, summer and fall big game needs and to enhance forage quality for big game.

Minerals

Mineral related operations will be according to approved operating plans. Conditions and stipulations will maintain forage and security cover to the extent practical.

Oil and gas leases will contain stipulations (3109-12) to protect forage producing areas and security cover.

Access requests will be evaluated and allowed on a case-by-case basis. Part of the evaluation will consider needs and will be dependent on whether or not it can be demonstrated that such access is the next logical step beyond the existing exploration and/or developmental stage. Such access will be coordinated with and incorporated into the area transportation plan. Final reclamation of all roads not needed for future management will be to near natural conditions.

Disposal of saleable mineral materials will be based upon need, proximity to alternate sources, and compatibility with the management goals for this area.

Timber

Classify timberland as suitable. Timber harvest will be conducted to diversify habitats and to maintain or enhance big game spring summer or fall habitat. Maintain adequate thermal cover needs on winter range. All timber projects will have concurrence of the Montana Department of Fish, Wildlife, and Parks biologists to assure meeting goals of the area.

Permit harvesting of forest products, such as Christmas trees and post and poles when compatible with elk calving and big game cover needs. Allow firewood gathering of pine species only.

Allow even-aged systems (clearcut, shelterwood) and uneven-aged systems (group and single tree selections), as determined by silvicultural prescriptions.

Facilities

Allow transmission corridors.

Permit road construction needed for surface management purposes and to access other management areas. Road use may be restricted during certain periods to protect wildlife. Road standards and locations will comply with the recommendations in the Montana Elk Logging Guidelines

Protection

Use "control" to "containment" depending upon location, expected fire behavior, and other criteria which will be stated in a Fire Management Action Plan.

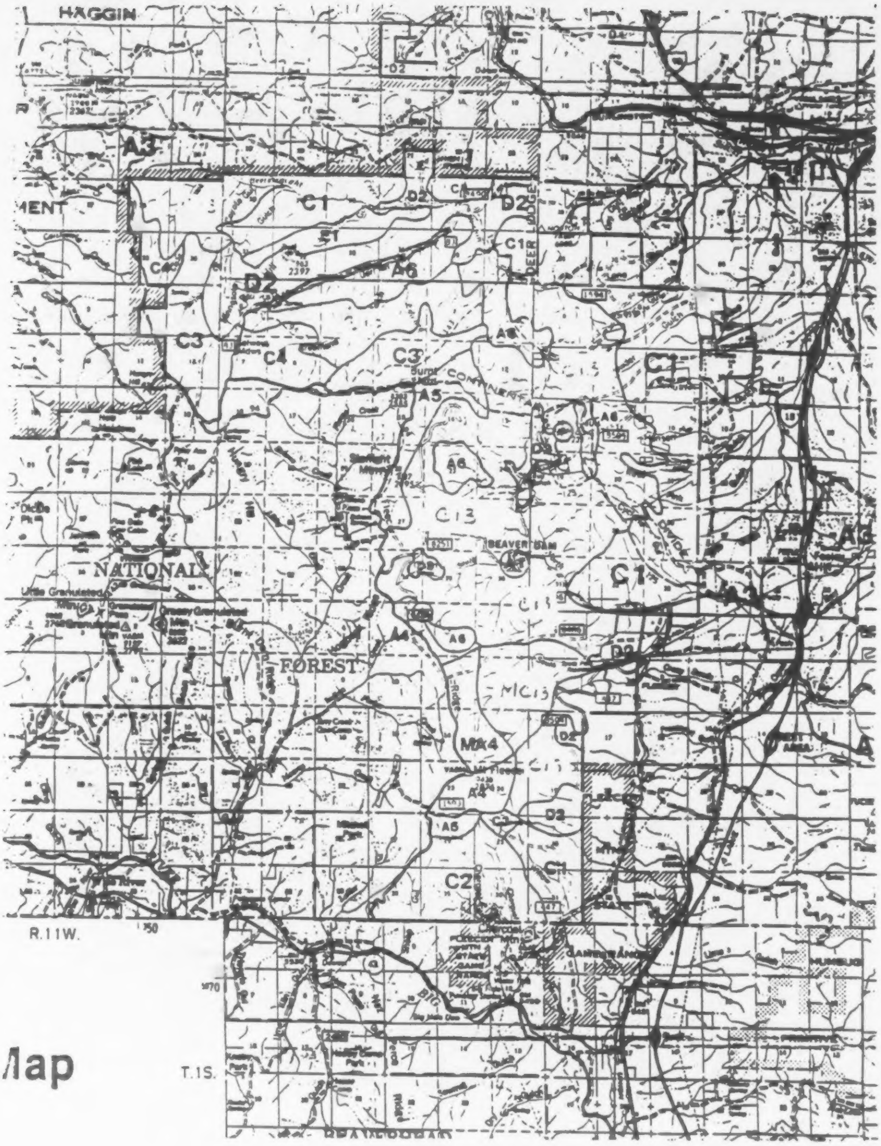
Use prescribed fire with planned and unplanned ignitions for the enhancement and maintenance of wildlife forage and cover. Criteria for fire use will be detailed in a Fire Management Action Plan.

Management Practices

See Figure III-2 at the end of this chapter.

Monitoring Requirements

See Figure III-3 at the end of this chapter.


HAGGIN
A3
MENT
C1
D2
D2
C1
C4
A6
DEER LODGE
C3
C4
C3
A6
CONTINENTAL
A5
A6
C13
C1
A6
C13
BEAVER DAM
NATIONAL
C13
C1
A4
A6
FOREST
D2
MC13
MA4
C13
A4
D2
A5
C1
C2
R.11W.
T.1S.
Map

APPENDIX 2

The following to Management Area boundary adjustments will be made in accordance with applicable laws and with appropriate public involvement.

MAP #	DESCRIPTION OF CHANGE AND RATIONALE
3	Change to Manage Area A5. The current designation represent an undersirable linear intrusion into a large undeveloped block of land.
4	Schedule no sawlog timber sales, other than the currently proposed Sapphire II Sale, in this area during the life of the Plan.
5	Change Management Area designation to C3. This area is within the Sapphire Wilderness Study Area (P.L. 95-150). The Forest Plan was developed without this area being available in decade one.
6	Change the Management Area designation to C1. The area tree cover is recognized as being more important to wildlife than first estimated.
7	Schedule no sawlog timber sales, other than the current South Senate Sale, in this area during the life of this Plan.
8	Change Management Area designation to C3. This area is within the Sapphire Wilderness Study Area (P.L. 95-150). The Forest Plan was developed without this area being available in decade one.
10	Change Management Area designation to C1 to provide both thermal and bedding cover at the edge of Montana State lands.
11	Schedule no timber sales in this area during the life of the Plan.
12	Preliminary information indicates a very high cost to develop these areas at this time. Change Management Area designation to A5.
13	Preliminary information indicates a very high cost to develop these areas at this time. Change Management Area designation to C3.
14	Schedule no timber sales in this area during the life of the Plan.
15	Change to C3. Area has been analyzed under the Electric Indian Timber Sale project EA. Development costs are high because of the wetness of the area and the amount of rock. Past cutting in the general area has resulted in this being one of the most heavily used areas for summering elk.
17	Schedule no timber sales in this area during the life of the Plan.
18	Change Management Area designation on parts of the area to A6 and C3 as shown on the attached map. Designation changed based on added field information.

19 Schedule no timber sales in this area during the life of the Plan.

20 Change Management Area designation to A6 and C3 as shown on the attached map. Designation changed based on added field information.

21 & 22 Continue with E1 designation and current project plans under the following conditions.

- Conduct only one sawlog sale in the area - no other sawlog sales during the life of the Plan.
- Use Section 299 - Composite Specification for roads and/or use temporary roads to the maximum extent.
- Initiate year long road closures for area (a larger area than these two map designations).

23 Schedule no timber sales in this area during the life of the Plan.

24 Change Management Area boundary in the Northeast part to C3. Schedule no timber sales in this area during the life of the Plan. Continue to monitor the Mountain Pine Beetle (MPB) population. Changes in MPB populations may result in some timber harvest action.

25 Change to C3. Added information and analysis strongly suggests this is a very costly area to develop at this time.

26 Change to C3. The change of Management Area corrects an error. Area should have been designated C3.

27 Change part of area to C3. On other part permit Timber Harvest on that portion that can be reasonably directly yarded to the existing road. Construct no new roads under this plan.

28 Change to C1. This is an important elk winter range area.

29 Change to A6. Area has been identified as inoperable.

30 Change to C3.

31 Schedule no timber sales in this area during the life of the Plan.

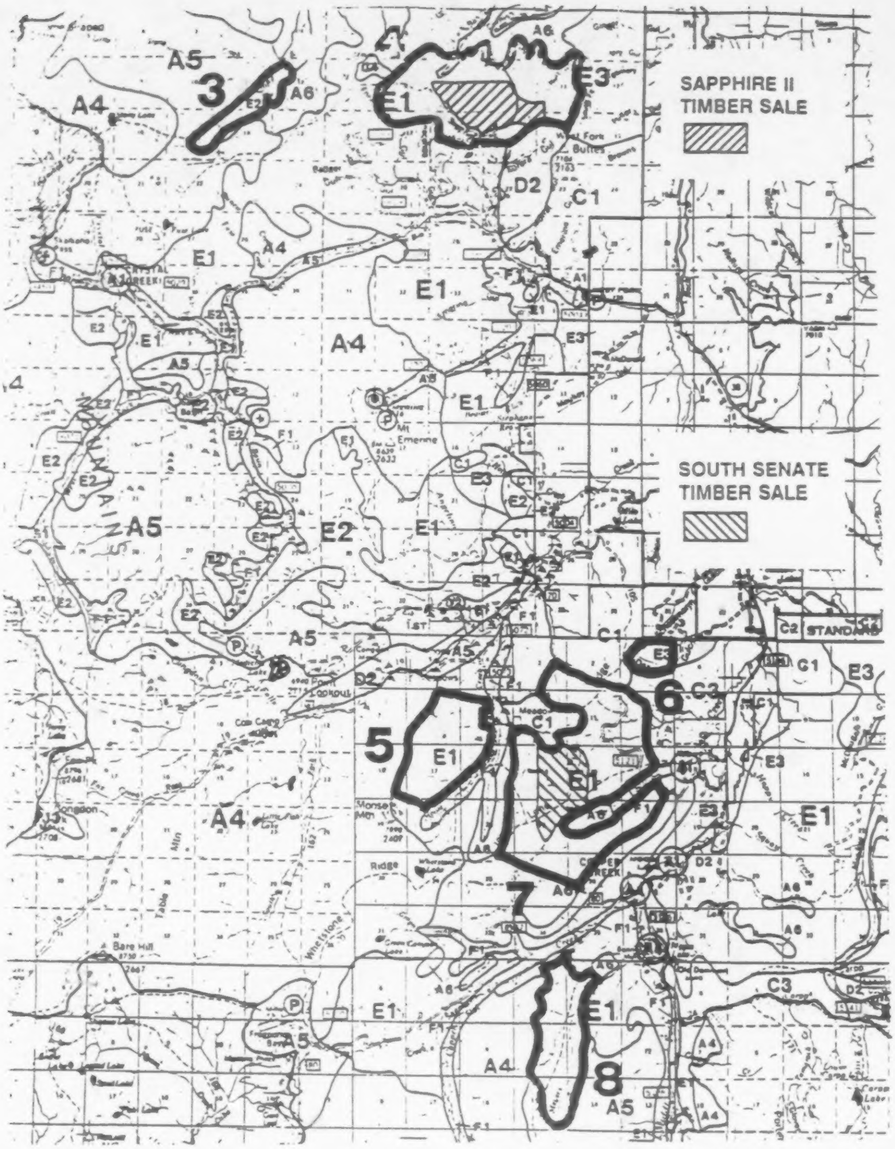
32 Schedule no timber sales in this area during the life of the Plan.

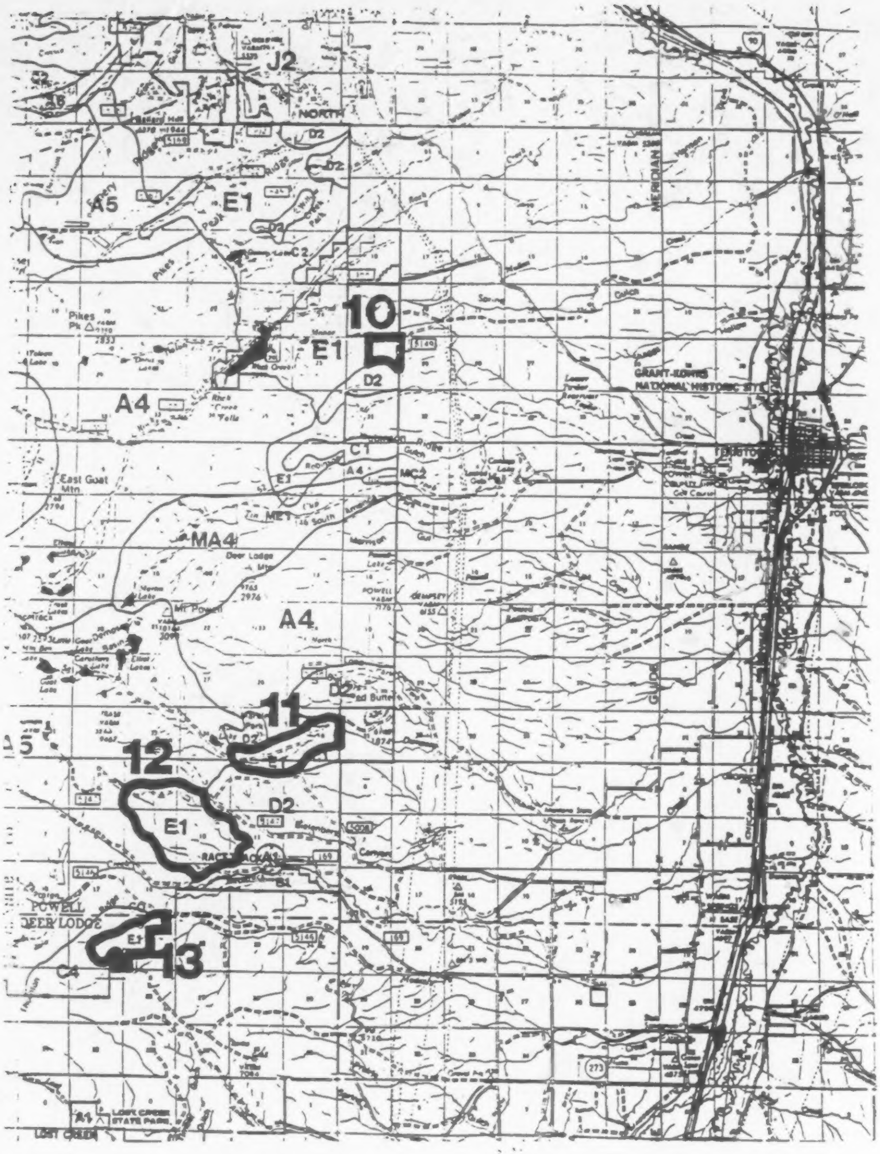
APPENDIX 2 (Summary Table)

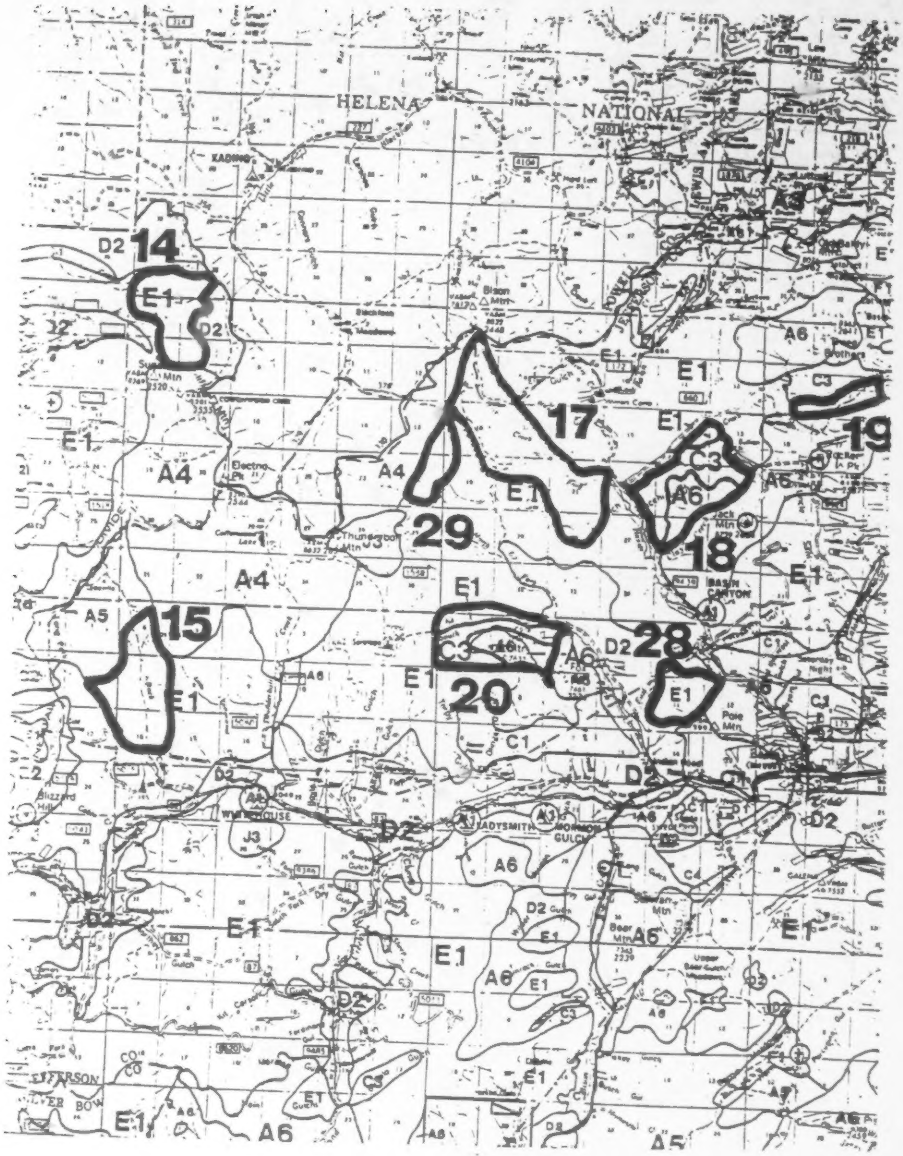
GROSS AREA CHANGES

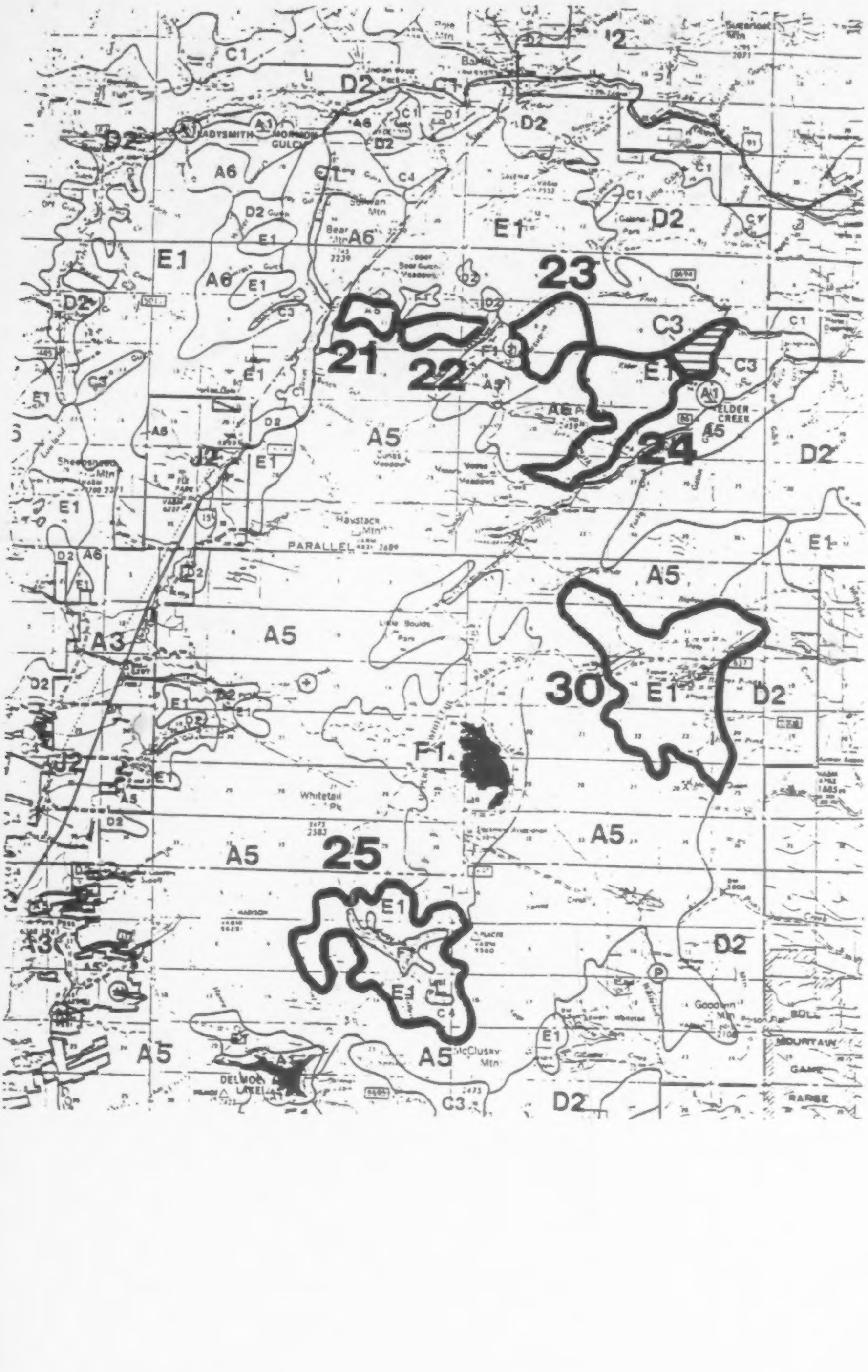
MAP #	GROSS ACREAGE OF AREA (ESTIMATED)	MANAGEMENT AREA CHANGES AS A RESULT OF NEW FIELD IMFORMATION AND/OR ANALYSIS	CHANGES OF SCHEDULE - NO SCHEDULED SALES FOR LIFE OF PLAN	MANAGEMENT AREA CHANGES
3	300			300
4	4500		3000	
5	1500			1500
6	300			300
7	4500		3600	
8	1600			1600
10	250			250
11	500		500	
12	1500			1500
13	400			400
14	1700		1700	
15	2000			2000
17	2200		2200	
18	2200	800		1000
19	400		400	
20	1500	900		300
21	400*			
22	400*			
23	1000		1000	
24			1800	700
25	3800	3800		
26	400			400
27	800			600
28	1000	800		200
29	700	700		
30	4000			4000
31	250		250	
32	200		200	
TOTALS	40,800	7,000	18,650	14,650

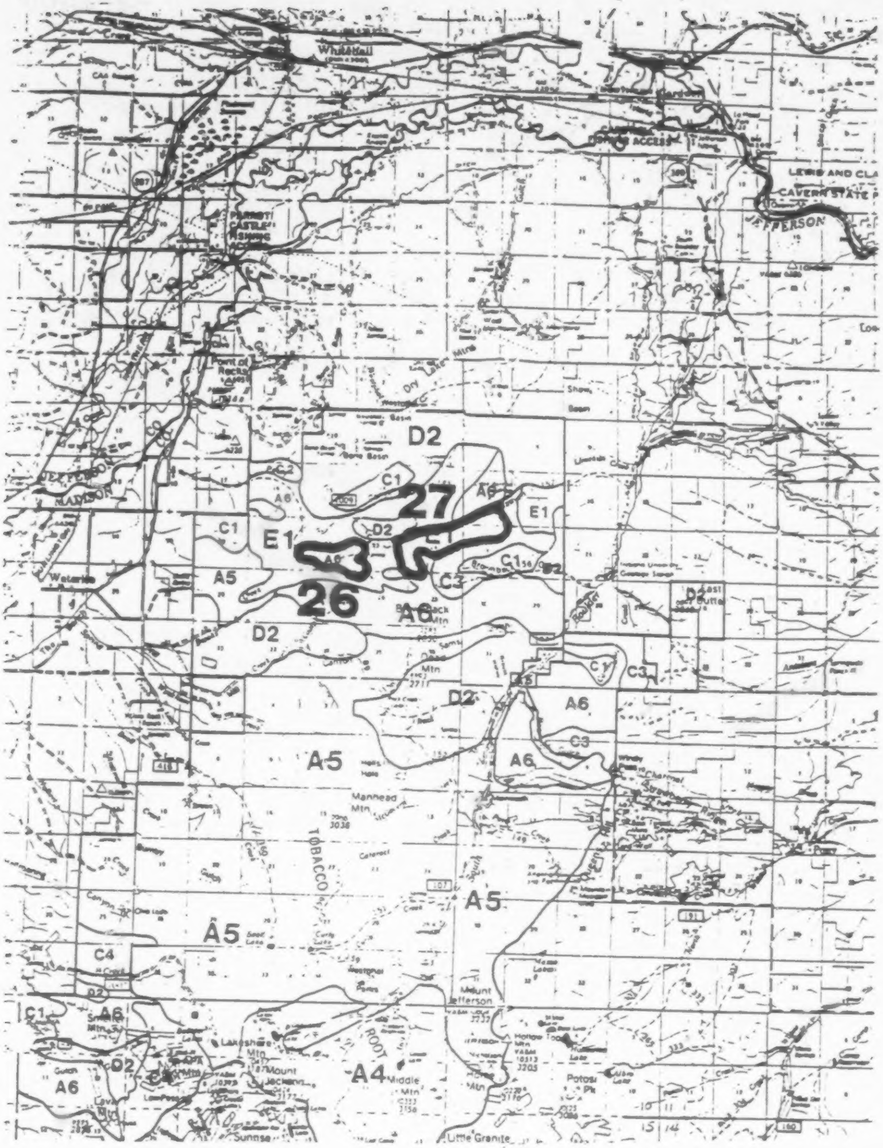
* See "Conditions" in attached narrative.


SAPPHIRE II TIMBER SALE
▨
SOUTH SENATE TIMBER SALE
▨
3
5
6
7
8
A4
A5
A6
E1
E2
E3
D2
C1
C2
C3
F1
STANDARD
CRYSTAL CREEK
Mt Emerine
Point Lookout
Monsee Mtn
Bare Hill
CEDAR CREEK
Badger
Whetstone


J2
NORTH
D2
D2
A5
E1
D2
C2
Pikes Pk
10
E1
D2
A4
C1
A4
MC2
E1
East Goat Mtn
MA4
Deer Lodge Mtn
Mt Powell
A4
D2
11
D2
E1
A5
12
E1
D2
RACETRACK
E1
POWELL
DEER LODGE
E1
13
C4
MERIDIAN
GRANT-KOHRS NATIONAL HISTORIC SITE
273
LOST CREEK STATE PARK
LOST CREEK


HELENA
NATIONAL
14
15
17
18
19
20
28
29
D2
E1
A4
A5
A6
C1
C3
J3
Bison Mtn
Electric Pk
Thunderbolt Mtn
Jack Mtn
BASIN CANYON
Pole Mtn
Blizzard Hill
WHITEHOUSE
LADYSMITH
MORMON GULCH
Bear Mtn
JEFFERSON
SILVER BOW


21
22
23
24
25
30
C1
D2
A6
E1
C3
C4
A5
A3
J2
F1
A1
LADYSMITH
MORMON GULCH
Bear Mtn
Sheephorn Mtn
Haystack Mtn
PARALLEL
Little Sounds Park
Whitetail Pk
ELDER CREEK
Goodman Mtn
McClusky Mtn
DELMOE LAKE
BOULDER MOUNTAIN GAME RANGE


Whitehall
Cardwell
LEWIS AND CLARK CAVERN STATE PARK
JEFFERSON
PARROT CASTLE FISHING ACCESS
Point of Rocks
Dry Lake Mine
Show Basin
JEFFERSON
MADISON
Waterloo
D2
C1
A6
27
E1
D2
C1
E1
A6
A5
26
C3
C1
A6
East Butte
D2
C1
C3
D2
A6
C3
A5
A6
Manhead Mtn
TOBACCO
ROOT
A5
A5
C4
C1
A6
D2
A6
Lakeshore Mtn
Mount Jackson
Middle Mtn
A4
Mount Jefferson
Hollow Top Mtn
Potosi Pk
Pony
Sunrise
Little Granite

APPENDIX 3

BEST MANAGEMENT PRACTICES FOR LOGGING AND ASSOCIATED ROAD BUILDING ACTIVITIES ON THE DEERLODGE NATIONAL FOREST

The following Best Management Practices, consisting of physical, biological and mechanical procedures, scheduling and permit requirements and/or prohibitions, are to be utilized when logging or building roads on the Deerlodge National Forest. The goal of these BMP's is to ensure that all Forest logging or road building operations will not place or cause to be placed any wastes, i.e. soil, silt, bark, slash, debris, sidecast, or other organic or earthen materials, in a location where they are likely to pollute State waters. It is recognized that application of these practices may not totally eliminate all pollution from all land disturbing activities. The intent of these practices is to control pollution to the extent practicable and necessary to protect beneficial uses.

Some of the following standards are referenced to existing Forest Service direction and guidance documents.

I. **ROADS:**

A. Planning and Location:

1) Minimize the number of roads constructed in a watershed through comprehensive road planning, recognizing intermingled ownership and foreseeable future uses and limiting adverse cumulative impacts to water quality. Use existing roads where practical, unless use of such road would cause or aggravate an erosion problem.

2) Fit roads to the topography; locate roads on natural benches and stable soil types to minimize the area of road disturbance. Avoid long, sustained, steep road grades.

3) If possible, locate roads on well-drained soils and rock formations that tend to dip into the slope. Avoid slide-prone areas characterized by seeps, steep slopes, highly weathered bedrock, clay beds, concave slopes, hummocky topography, and rock layers that dip parallel to the slope.

4) Avoid high erosion hazard sites, such as steep narrow canyons, slide areas, slumps, moisture-laden or unstable toe slopes, swamps, wet meadows, or natural drainage channels. Avoid riparian areas except when needed to cross streams.

5) Only stable stream crossing sites shall be used and road grades shall be adjusted to reach these crossings (FSH 7709.56 2.32(8)).

6) When selecting sites for stream crossing structures consideration should be given to; placing the crossing on a straight stretch of stream, using a 90 degree crossing where possible, and avoiding locations that involve a channel change (FSH 7709.56, 2.32(8)).

B. **Design:**

1) Roads shall be designed to the criteria identified in the NEPA document that addresses the intended uses recognizing safety, cost, and impacts on land and resources (FSM 7721).

2) Road widths shall be no wider than necessary to accommodate the anticipated use considering vehicle types, traffic volume, design speed, surface condition and type, and the presence or absence of shoulders and ditches (FSH 7709.56, 4.24).

3) A Stream Protection Act Notification Form (FG 124) must be filed with the Montana Department of Fish, Wildlife, and Parks before any disturbance to soil or vegetation can occur within the normal high water mark of Forest streams. This includes fords or temporary crossings or perennial streams (FSM 2611.1).

4) Drainage:

   (a) Stream crossings shall be designed to minimize disturbance to soil, and maintain water quality and fish habitat [FSH 7709.56 2.32(8)].

   (b) Fill material, essentially free of organic material shall be used during the installation of bridge or culverts [EM 7720-100LL- 206.07].

   (c) Bridges and culverts shall be designed to protect and conform with natural stream flow patterns, stream bed and slope and fish migration needs (FSH 7709.56 4.4 and 4.5).

   (d) Ditch drainage (relief culverts) should be installed at the gradient of the original ground slope, where possible, and skewed to improve flow characteristics, reduce siltation problems and reduce possibility of culvert plugging (FSH 7709.56, 4.41).

   (e) Where permanent culverts or bridges are installed they will be capable of conveying the 50-year frequency runoff [FSH 7709.11 71.1 (R-1 Supplement 20)].

   (f) For insloped roads, ditch gradients shall be steep enough, generally greater than 2 percent, but less than 8 percent, except in stable material, to prevent sediment deposition and ditch erosion. Use the higher gradients for more stable parent materials; use the lower gradients for less stable soils (FSH 7709.56 4.41).

   (g) Road drainage shall be routed through riparian areas, filtration fields or other sediment-settling structures or systems of adequate design and sediment filtering capacity to prevent the pollution of State waters.

C. Construction:

1. Operating overland vehicles within State waters is prohibited, except for short-term construction or emergency activities approved by Stream Protection Act process.

2. A Short-term Exemption from Surface Water Quality Turbidity Standards may be required from the Montana Department of Health if short term construction activities will increase turbidity and thus violate water quality standards. (A.R.M. 16.20.633(3))

3. Keep slope stabilization, erosion and sediment control work as current as possible with road construction. Complete or stabilize road sections within the same operating season as the construction disturbance, rather than leave road sections in an unstable condition over a winter season. Install drainage structures concurrent with construction of new roads and always prior to fall or spring runoff (FSH 7709.56 4.5).

4. All soil disturbances caused by road construction shall be stabilized by seeding, compacting, benching, mulching or other suitable means within the same operating season as the construction disturbance. Erosion control measures must be in place and functional prior to Fall or Spring runoff (FSH 7709.56 4.5).

5. At the toe of potentially erodible fill slopes, particularly near stream channels, pile slash in a row parallel to the road or provide other suitable measures to trap sediment. Where slash filter windrows are used, provide breaks that will not increase the erosion potential, nor become an impediment to wildlife movement (EM 7720-100LL-201.05).

D. Maintenance:

1. Proposed maintenance levels are established in the Transportation System Analysis/ Planning process. The maintenance levels are 1 through 5 as defined in FSH 7709.15, Figure 12.1-1.

2. The primary objective for Level 1 roads is the maintenance of drainage facilities and runoff patterns to protect the road investment and to see that damage to adjacent land and resources is held to a minimum.

3. Road surfaces of Maintenance Levels 2, 3, 4, and 5 roads shall be maintained as often as necessary to provide the proper driving surface based on traffic volume and type, to prevent erosion of the subgrade, and to retain the original surface drainage. At a minimum, this requires restoring the road surface crown or outslope and maintaining the effectiveness of all drainage and sediment control mechanisms.

4. Road surfaces of roads closed to vehicular traffic shall be left in a condition that minimizes erosion and prevents pollution of State waters. Examples of erosion control include gravel surfacing, the installation of additional water bars, drainage facilities, settling and filtration area or revegetating the road surface.

5. Material removed by maintenance operations and not used in the maintenance of the roadway (ditch cleanout, culvert cleaning, etc.) shall be hauled to disposal sites and stabilized to prevent erosion. -

6. Maintain bridges and culverts so they function as they were designed with maximum effectiveness. Provide added maintenance after significant storm events as needed.

7. The surface of all Forest System roads not planned for use within a two-year period will be scarified and seeded.

8. Short-term roads not planned for future management activities shall be reclaimed as soon as the specific management activity is completed by revegetating the road prism to effectively control erosion.

II. LOGGING OPERATIONS

A. Protection of State waters and riparian areas.

(1) The use of motorized vehicles in riparian areas, wet meadows, bogs, marshes or wetlands is prohibited, except on maintained, active roads, during approved road construction, on designated skid trails or in the winter on frozen surfaces.

(2) Tractor and other ground skidding through State waters is prohibited unless authorized by Stream Protection Act process.

B. Location and design.

(1) For each log landing, skid trail or fire trail a drainage system shall be designed and maintained that will control the erosion of sediment and prevent the pollution of State waters.

(2) Log landing sites shall be located:

a. on stable sites, where the least amount of excavation is required;

b. where the least number of skid roads are required; and

c. where sidecast materials will not be placed in a location where they are likely to cause pollution of State waters.

C. Harvest activities.

(1) Waste material from construction or maintenance of landings, skid trails and fire trails shall be placed in geologically stable locations outside of streamside riparian areas.

(2) Soil stabilization procedures and the installation of drainage systems for log landings, skid trails and fire trails shall be concurrent with logging activities. The construction of water bars or the reseeding of trails and landings shall be done whenever natural revegetation will not prevent erosion before the next growing season.

(3) Do not fall trees or leave slash in streams unless otherwise authorized by Forest or State fishery biologists.

D. Slash treatment and site preparation.

(1) Brush piling and scarification shall be conducted only when soils are dry enough to avoid compaction and erosion.

(2) Soil shall be scarified only to the extent necessary to meet the reforestation objective of the site. Low slash and small brush shall be left wherever needed to reduce erosion, retain soil nutrients and provide shade for seedlings.

APPENDIX 4

PUBLIC PARTICIPATION FOR FOREST PLAN IMPLEMENTATION

Background

Two items, the District Ranger's Annual Program and the Forest Supervisor's Annual Report are the cornerstone of our Public Participation efforts. One explains what will be happening on each District during the coming year and the other explains what did happen on the Forest during the last year. Both are distributed as newspaper inserts.

Other items important to facilitating public participation include our mailing list which contains names as well as areas of interest, and our numerous formal and informal public contacts.

Because Forest Plans represent a different way of viewing Forest management our Public Participation efforts needed review. The following process steps resulted from that review. These steps are prescribed for "area analysis/Forest Plan Implementaion efforts and in principle are strongly encouraged on all other projects requiring a NEPA document.

Public Participation Process

1. Develop a one page Forest Plan Implementation/Public Participation handout.
2. Schedule Forest Plan Implementation on areas of the Forest.
3. Mail handout and schedule to all publics on mailing list (the material will highlight any activities scheduled in inventoried roadless areas. The roadless name and the portion affected will be identified). Request response on area of interest. Revamp mailing list.
4. As scheduled start scoping for each area.
5. Share preliminary scoping results (Issues, Concerns, Opportunities, Decisions already made and Decisions to be made - Chapter 1 of EA/EIS). If roadless lands are involved in the area being analyzed special emphasis will to be placed on the "roadless" issue.
6. Finalize Issues, Concerns, Opportunities, and Decisions to be made. Contact with those who commented in step 5.
7. Develop Alternatives to be analyzed. Show relation of Alternatives to Issues, Concerns, Opportunities and Decisions to be made. Share with publics who have been involved in steps 5 and 6.
8. Complete NEPA document (EA/EIS). Announce availability of document. Offer to meet with interested parties.
9. Sign Decision (Decision Notice/Finding of No Significant Impact/Record of Decision). Mail to interested parties. Announce Decision in media. Post decision at Supervisor's Office and appropriate District Office(s).

RICHARD J. CALL
Acting Forest Supervisor

DATE

APPENDIX 5

SECTION 299 - COMPOSITE ROAD CONSTRUCTION

DESCRIPTION

299.01 Work

This work shall consist of clearing and grubbing, excavation and embankment, and erosion control. clearing and grubbing shall include treatment of merchantable timber, and disposal of construction slash, including all designated trees. Excavation and embankment shall include borrow, drainage excavation, shaping the roadway, including approaches, turnarounds, ditches and drainage dips, and disposal of all excavated material, regardless of it nature. Erosion control, when specified, consists of furnishing and placing required seed, fertilizer, mulch and tackifier. Construction of the roadway shall be in conformance with the dimensions SHOWN ON THE DRAWINGS and DESIGNATED on the ground.

MATERIALS

299.02 Requirement

Material shall meet the following requirements:

(a) Seed shall meet the requirements of Federal Specification JJJ-S-181 and shall have been tested within the past 6 months.

Seed shall be certified to meet state requirements for containment of noxious or undesirable plant seeds.

(b) Mulch shall be grass, hay, or grain straw in an air dry condition or wood cellulose fiber. Mulch shall be free of noxious weeds, mold, or materials injurious to plant growth.

(c) Fertilizer shall be standard commercial grade furnished in sealed containers with name, weight, and contents clearly marked.

(d) Tackifier shall be emulsified asphalt Grade SS-1, SS-1h, CSS-1, or CSS-1h or as SHOWN ON THE DRAWINGS.

CONSTRUCTION

299.03 Clearing & Disposal

All trees, snags, downed timber brush, and stumps within the clearing limits shall be removed and disposed by:

(a) Decking or removing timber meeting utilization standards as SHOWN ON THE DRAWINGS.

(b) Decking unmerchantable timber as SHOWN ON THE DRAWINGS.

(c) Treating the construction slash larger than 3 inches in diameter and 3 feet in length by one or more of the following methods as SHOWN ON THE DRAWINGS.

Method A.	Incorporate construction slash in the embankment.
Method B.	Windrowing construction slash outside the clearing limits. When slash is windrowed, it shall be placed approximately parallel to the roadway outside the toe of the fill slope.
Method C.	Scattering construction slash outside the clearing limits.
Method D.	Piling for future disposal.

(d) Construction slash less than 3 inches in diameter and 3 feet in length may be incorporated into embankment so long as the material is distributed so that it does not result in concentrating or matting.

Slash shall not be deposited in stream courses.

Fire-dangerous dead trees or unstable live trees, DESIGNATED by the Engineer within 200 feet slope distance of the centerline of roads shall be felled and disposed of in accordance with (a), (b), or (c) unless there is agreement that removal would cause unnecessary damage to residual timber or roads.

299.04 Pioneering

Pioneering operations shall not undercut the final back slope, deposit material outside the roadway limits, or restrict drainage.

299.05 Grubbing

Grubbing limits shall be as SHOWN ON THE DRAWINGS. Stumps outside the grubbing limits may remain, but shall be cut no higher than 12 inches above the original ground measured on the uphill side unless otherwise SHOWN ON THE DRAWINGS.

299.06 Excavation & Embankment

The roadway shall be constructed to conform to the typical sections SHOWN ON THE DRAWINGS. Embankment may be placed by side casting and end dumping.

The location and requirements for use or borrow material and any requirements for the removal and disposition of unsuitable or excess material will be as SHOWN ON THE DRAWINGS.

Rocks to large to be incorporated in the embankment shall be place outside the traveled way on the downhill side, so that they will not roll, obstruct drainage, or hinder the use and the maintenance of the roadbed.

To facilitate seeding, slopes shall be left in a roughened condition.

Unless otherwise SHOWN ON THE DRAWINGS, the roadbed shall be shaped and finished to that ordinarily accomplished by a crawler tractor with dozer blade to provide drainage of surface water. Individual rocks, within the roadbed, shall not protrude over 4 inches about the subgrade. A motor grader finish is not required.

Unless otherwise SHOWN ON THE DRAWINGS, the traveled way width shall not exceed the specified dimension by more than 2 feet.

299.07 Erosion Control

Seasonal limitations for seeding are SHOWN ON THE DRAWINGS. The seeding shall not be accomplished during windy weather, nor when the ground is excessively wet, nor when the ground is frozen. The methods and rates of application, and types of seed, fertilizer, mulch, and tackifier shall be as SHOWN ON THE DRAWINGS. Materials shall be applied uniformly to the areas to be treated.

MEASUREMENT

299.08 Method

The method of measurement, as described in Section 106, will be DESIGNATED in the SCHEDULE OF ITEMS.

PAYMENT

299.09 Basis

The accepted quantities will be paid for at the contract unit price for each pay item shown in the SCHEDULE OF ITEMS.

Payment will be made under:

Pay Item		Pay Unit
299(01)	Composite Road Construction	STA.
299(02)	Composite Road Construction	MI.
299(03)	Composite Road Construction	L.S.

Department of Agriculture,
Office of the Secretary,
Washington, DC, April 28, 1988.

Subject: USDA Decision on Administrative Review by the Chief of the Forest Service related to Administrative Appeal No. 1581 of the Beaverhead National Forest Land and Resource Management Plan.

To: F. Dale Robertson, Chief, Forest Service.

Pursuant to 36 CFR 211.18(f) (2) and (5), and authority delegated to me by 7 CFR § 2.19(d)(18), I elected to review the November 28, 1988 decision by the Chief of the Forest Service in Intermountain Forest Industry Association's appeal, No. 1581. This letter constitutes my decision.

BACKGROUND

The appellants in this appeal include: Intermountain Forest Industry Association (IFIA); Montana East Side Forest Practice Committee; Montana Logging Association; F.H. Stoltze Land & Lumber Company; Stoltze-Conner Lumber Company; Darby Lumber, Inc.; Idaho Forest Industries, Inc.; Louisiana-Pacific Corporation; Wilke Brothers Sawmill, Inc.; Townsend Lumber Company; Kelly Logging, Inc.; Christofferson's Logliners, Inc.; Rex and Rosie Lewis; Don Fjermestad; Coleman Construction, Inc.; Thomas Miller and Robert Miller; Bennett Owen, Inc.; Shellack Engineering and Associates; Day Oil Company, Inc.; Jay Chesley; Paul's Motor Company, Inc.; Robert Brandbo; Robert Gerringa; Lloyd Winden; Eliel's, Inc.; William Jappe, Inc.; Jim McIssaac; Robert J. Harrison; Beaverhead County Board of Commissioners; City of Dillon, City Council; Employees of F.H. Stoltze Land & Lumber Company; Mr. Don Ori; Representative Bill Hand, Mr. Robert B. Davison; and Mr. Robert F. Hassman.

Intervenors in this appeal are: Amfac Company; Bitterroot Industrial Supply; Bearings, Inc.; All-Mark, Inc.; Long Machine; Mr. Harold Mildenberger; Carpenter Paper Company; and Donaldson Brothers Ready-Mix, Inc.

The appellants state they will be adversely affected by the operation of the Beaverhead National Forest Land and Resource Management Plan (LRMP) approved by the Regional Forester's decision because it will reduce the volume of timber sale offerings permitted from the Beaverhead National Forest below the level set in the Timber Management Plan adopted in 1978; that other sources are insufficient to provide substitute volumes to sustain mill operations beyond a few years. Appellants urge that the implementation of the LRMP is likely to result, for all appellants or their members or constituents, in reduced employment, increasing operating costs, lost profits and for some of them loss of capital investments. The appellants also aver that the analysis of demand for timber needed to support the existing economy and to generate more jobs and economic activity was superficial, factually erroneous, and legally inadequate and that the significantly adverse economic consequences of the selected alternative and LRMP have not been evaluated (Notice of Appeal (NOA) and Supplemental Statement of Reasons (SOR)).

The appellants desire relief that includes no reduction in timber sale offerings from levels called for prior to the Record of Decision (ROD) and a new decision with appropriate supplementation to the FEIS to significantly increase suitable acres and harvest of standing sawtimber (NOA).

DECISION

I am ordering the preparation of a new Record of Decision addressing alternatives which establish a higher allowable sale quantity (ASQ). The Regional Forester should fully examine the values foregone by choosing a higher ASQ than established in the approved LRMP. The Regional Forester shall prepare any NEPA documentation required for the new ROD. The new ROD will be subject to administrative appeal under 36 CFR 217. The approved LRMP will remain in effect until the new ROD is issued.

DISCUSSION

I concur with the Chief's decision that directs the Regional Forester to reexamine the analysis of demand for timber needed from the Beaverhead National Forest to supply installed mill capacity and to assure employment in the affected areas. However, I do not concur with the Chief's conclusion that "all of the available indicators of consumption were considered and disclosed" in the Final Environmental Impact Statement (FEIS) which accompanied the Record of Decision approving the Beaverhead LRMP. The Analysis of the Management Situation (AMS) Summary (pp. 181–182) reported that demand for timber was expected to at least equal the amount of timber that will be offered for sale from National Forest lands and, with the increasing difficulty in obtaining private timber, all of the timber put on the market will probably be sold under favorable market conditions. The FEIS Chapter III discussion of 1978–1983 historic timber offerings and sales and existing mill capacity on pages III–21 and III–22 is an insufficient demand analysis for the planning period in view of the expected decline in timber supplies from private lands. Relevant and material evidence of the future 10-year demand for timber needed to sustain existing levels and potentially increase future levels of employment was presented by one of the appellants during the planning process in comments to the draft environmental impact statement (Inland Forest Resource Council, May 31, 1985, pp. 5–8) and was summarized in the Supplemental SOR (pp. 4–6) and attachments to the NOA (Inland Forest Resource Council, May 31, 1985) but the Record of Decision does not demonstrate it was considered.

It appears from the appeal record (NOA, pp. 2–4) and from some of the other alternatives considered (e.g. Alternatives A, B, F, G, H departure, and W) by the Regional Forester in the FEIS that there is both a very large timber inventory on the Forest and a natural growth potential for timber on the Forest that could sustain a considerably larger allowable sale quantity than is established by the approved LRMP. The Record of Decision does not demonstrate why the adverse consequences to established mills and woods-related employment likely to result from the approved Beaverhead Plan maximizes net public benefits.

An example of the failure of the Record of Decision to adequately explain the decision is the inconsistent treatment of the ranch and timber industries. The Record of Decision makes it clear that the local ranch industry is dependent on National Forest forage production—"without the National Forest many of these permittees would have difficulty sustaining a viable operation" (ROD p. 17). The Regional Forester also finds that reducing the output and use of National Forest forage by ranchers is undesirable in these terms—"I believe there are undesirable side effects on established uses (ranch enterprises) and on the local economy" (ROD p. 17). However, although acknowledging that timber harvests from the Forest are important to community stability and the economic livelihood of local mills (ROD pp. 19, 22), the Regional Forester decided to reduce the ASQ below the existing level, and below that desired by the local timber industry (ROD p. 19).

A reduction in timber outputs and use would have the same undesirable effects on sustaining viable operations for timber enterprises, on established timber uses and on the local economy as a similar reduction would have on the ranching industry. The Record of Decision needs to be redone to deal consistently with the benefits attributable to the viability of local enterprises, established forest uses, and the local economy derived from timber and range forage production and related sales and leases on the Beaverhead National Forest.

Having limited my review to the matters described, I am content to have the Beaverhead National Forest LRMP remain in effect pending completion of the analysis, any necessary revisions or amendments to the FEIS, and the issuance of another Record of Decision for the LRMP as ordered by this decision.

This decision is limited to the review of the decision by the Chief of Forest Service of Intermountain Forest Industry Association's appeal No. 1581 on the Beaverhead National Forest LRMP. My actions on the review of the Chief's decisions on the other appeals of the Beaverhead National Forest Plan (listed below) will be forthcoming in another decision.

Appeal No.	Appellant
1574	Mark A. Mackin.
1575	Big Hole Ranchers Associations.
1596	National Wildlife Federation et al.
1597	Wise River Sportsmen's Association.
1603	Western Environmental Trade Association.

GEORGE S. DUNLOP,
Assistant Secretary,
Natural Resources and Environment.

PREPARED STATEMENT OF ROBERT E. WOLF, FORESTER, ST. LEONARD, MD

Mr. Chairman: I subtitle this testimony "Deja Vu, All Over Again." My legislative experience goes back to 1953—36 years. One of the long time themes of the Forest Industry has been the need to change the Forest Service Appeals process. Quicker action yielding the results they desire has been their theme. In 1962, the Industry descended en masse on Washington with what it called its "Four Points." The claim was that 200,000 people were unemployed in the timber industry and it was all the fault of the Federal Government, with the Forest Service the lead culprit. The Industry Point 3 was revision of the administrative appeals process to (1) speed it up, (2) provide an "adversary" setting where it could cross-examine the Forest Service when a firm wanted to appeal a timber contract or timber road issue, and (3) assure the forum was independent of the Service. In those days conservation organizations did not appeal agency actions, this was the almost exclusive province of those with timber contracts, grazing permits and mining claims.

Now the Forest Products Industry and the Forest Service want to make it more difficult for conservation groups to secure an administrative review of their concerns. They would tilt the jury box.

You have available the analyses of revisions in the appeals process by the Congressional Research Service and the General Accounting Office, as well as others. I shall not replow this ground. I shall touch on aspects that have been overlooked in the furor.

It was my privilege to help in the creation of the National Forest Management Act of 1976, as well as on the RPA Act.[1] One of the fondest hopes of Senator Hubert Humphrey, which was fully shared by the other Members of the Senate and House who participated in shaping these Acts, was that they would reduce litigation and produce better working relationships among those contending for the forest and rangeland resources, private and public. I shall address why I think this goal remains especially elusive on the National Forests.

First, I view the volume of appeals as an indicator of general dissatisfaction with the proposed National Forest Plans. I think that commodity or noncommodity groups file appeals for reasons they believe are just. The solution will not be found in changing the appeals process. It will come when the Forest Service addresses the reasons for the several publics registering their votes of low confidence.

There are two principal causes for the situation: (1) The Forest Service has not created the open communication system required by the NFMA; and (2) Proposed Plans fail to give a clear picture of past Plan results and the basis for proposed actions.

AN OPEN COMMUNICATION SYSTEM—ADVISORY BOARDS

Senator Lee Metcalf added Section 14(b) of NFMA which provides that there *shall* be on each Forest an Advisory Board made up of a representative cross-section of the groups interested in the Forest. For the 13 years since 1976 the Service has failed to use this road to creating better understanding and a climate of trust. In this period it added about 150,000 miles to its timber road system but has not built one foot on this useful communication bridge.

Advisory Boards are not a "cure-all," but they can perform a vital function. Here diverse individuals with conflicting views can be brought together on common ground to express concerns and share ideas. These Boards can be a first-rate agency "listening post."

For example, the Forest Service meets regularly in closed door sessions with the NFPA's Federal Timber Purchaser's Committee. Here it has discussed such things as proposed changes in timber contract terms, added bail-out relief to timber purchasers on no-cost extended pre-1982 contracts, timber appraising and road standards. It does not hold similar regular meetings with conservation groups—and it should not. What it needs to do is hold regular discussions of issues with a cross-section of the people concerned with the operation of the National Forests, where these issues are put on the table. Issues of public concern should be publicly discussed.

For an extended period the Service discussed detailed planned changes in timber contracts with Industry. These were well along when I asked for a copy of the proposals. The employee doing the staff work declined to provide them claiming they were "confidential." When I asked if discussions had been held with conservation groups, I was told "They aren't interested." Various conservation groups told me they had never been approached to determine if they were interested. This notion that only the "selected" few can be entrusted with what is public information, I find mind-boggling. This demonstrates why the Service suffers from a "public confidence gap."

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[1] At Senator Hubert Humphrey's request, I did the original drafting of the RPA and NFMA. At the request of Chairman Herman Talmadge, I explained the provisions of the legislation to the Joint Committee as they marked up the bills and helped develop alternative language for their consideration, as requested. I also performed this same function in the House-Senate Conference.

In short, the Forest Service has created a significant part of its problems by pursuing a strategy that assumes that bridges are only to cross streams, while failing to build the real bridges that create people understanding.

Section 14(b) is one of a relatively few section of NFMA where the word *"Shall"* is used. The Service also has a dismal track record with Section 6(*l*), which requires financial analysis; 8(c) which intends that annual reports be publicly available when the budget comes out; and 6(k), which sets up temporary timber land use restrictions while work goes forward to remove the condition that limits this use.

THE VALUE OF OPEN ADVISORY BOARDS

The old style advisory boards, used both by the Forest Service and BLM, were largely ineffectual because of the way they functioned. Members served for long periods. Agendas were limited and controlled by the agencies. Meetings were often closed. "Give and take" discussions were avoided. Boards which rotate citizen members will bring in new ideas. Boards that bring in people who are outside the normal interest groups can broaden community interest. Meetings that give the broadest community chance to present their ideas can be useful in building bridges of understanding. Meetings where agency personnel and citizens present ideas can encourage healthy wide-ranging debate. Advisory Boards, when they create a climate of communication, can produce understanding over time.

Public administrators do need some training in how to search out people who will take an active and healthy interest, in how to relate to a board, in how to get community and agency issues on the table, in how to encourage discussion and in how to assure that the Board's role is as intended, advisory.

Since Section 14(b) of NFMA specifies Advisory Boards *SHALL* be created, the Committee should instruct the Forest Service that it use the law.

THE "MONTANA AMBASSADORS" REPORT AND THEIR PROPOSAL FOR CHANGING APPEALS

A proposal to change the appeal system is contained in "The Southwest Montana Mill Crisis," March, 1989, issued by the Montana Ambassadors, the Montana Department of Commerce and its Small Business Development Center. Part of the funding for this work came from the U.S. Small Business Administration.

This report contends that two "study" mills have a timber supply crisis because:

1. Not enough Federal timber is being sold, although growth exceeds sales.
2. Appeals delay sales.
3. Sale levels have declined, not only in the study area but also statewide.
4. Failure to resolve the Wilderness issue is a supply constraint.

The report errs in assuming that biologic growth levels can be translated into sale volumes. It dwells on whether the timber can be profitably manufactured but avoids analysis of the fact that Forest Service timber growth and marketing requires a tax supported subsidy. Also the report cites total proposed Wilderness acres, it does not show by site and species, what parts, if any, are financially amenable to timber production based on agency costs. Their proposed solutions include:

1. Limit ability of groups to file appeals.
2. Resolve Wilderness issue and "release" timbered lands.
3. Mandate Forest Plan implementation and increase timber sales.

At page 10 the report observes that, ". . . no business enterprise, simply 'needs supply.' What business enterprises need, to survive long-term, is a supply *at a cost* which allows total costs of production to remain below the selling price for the goods in question."

The pity is that the "Ambassadors" failed to apply this logic to the Forest Service timber program even though the evidence of its stark cost ineffectiveness was readily available.

In FY 1988 *ALL 10* Montana National Forests lost money; −$21 million on a Cut of 566.5 Mil. BF. This loss ranged from as much as −$121/Mbf on the Custer to as low as $21/Mbf on the Kootenai. This is under TSPIRS loose and benign assumptions. A straight cash-flow picture would show even greater losses.

The two mills in the study draw their supply from a total of four Montana National Forests. In 1988 these Forests presented the following financial result according to Forest Service TSPIRS data.

	Timber program loss in dollars [1]	Loss per MBF CUT [1]	Volume cut MBF	Amortization time roads and reforestation (years)	Roads built	
					New	Reconstruction
1. Beaverhead	$2,454,000	$105.25	$23,616	115	10	6
2. Gallatin	1,224,700	70.16	17,453	158	1	22
3. Helena	923,000	81.81	11,285	165	12	8
4. Lewis/Clark	839,100	62.28	13,472	91	0	0
Total	5,440,800	83.03	65,526	[2] 132	23	36

[1] Includes proportional Regional and Washington Office costs and per MBF loss computed based on timber cut. Service does not show this.

[2] Year average.

This table shows heavy Forest Service losses, ranging from −$105/MBF down to −$62 per MBF on the four Forests important to both study mills. This level of losses would fail the "Ambassadors' test" that costs remain below the selling price of the goods in question, i.e., standing timber. Their report urges that more timber be sold. It argues that the "no-bid" sales are evidence that the timber is priced higher than its value to the mill. Clearly the agency data shows that the Bid rates miss the Government costs to make the timber available by $83/MBF—a loss no prudent businessman would incur on his "Multiple-Use Tree Farm."

In 1988, 59 miles of timber roads were "built" but 60 percent of the miles were rebuilt roads. TSPIRS uses amortization periods for roads and reforestation that average 132 years. Typical road design life is 20–25 years. Anyone familiar with these Forests would know that most of the 36 miles that were rebuilt were not over 25 years old. This reinforces the point that on a real cash-flow basis the timber program on these four Forests requires a substantial subsidy. A larger timber program would require a greater subsidy.

In 1988, 79 National Forests, under TSPIRS incurred $98 million in financial losses. Based on a Cut of 3.6 billion board feet, this was a loss of −$26 per MBF. In 1987 the TSPIRS loss was −$21/MBF. Thus the 1988 "Loss" Forests are running a $5/MBF greater loss than in 1987. Further, 29 Forests had losses over $50/MBF Cut and 8 had losses that exceeded $100/MBF Cut.

In the United States 70 percent of the land rated as "commercial" caliber forest is privately owned and operated. There is a legitimate public interest in citizens being able to raise questions via the appeal process about the fiscal soundness of Federal funds granting an unregulated subsidy to those who seek to secure National Forest timber.

The report also errs in the claim that a lower timber program would reduce county payments under 16 U.S.C. 500. The timber program 25 percent payments averaged $0.08/acre on these four Forests, about 80 percent of the total. Payment in lieu of taxes (PILT), administered by BLM, pays the difference between the 25 percent payments and $0.75 per acre. The 22 counties in these four Forests would get the same total payment even if there were no timber program. It would all come from PILT and the $0.75/acre is not limited to use on only roads and schools.

The "Ambassadors" report has such serious omissions of relevant facts that it should not be the basis for your Committee recommending changes in policy.

Helping the Forest Service Regain Public Confidence

1. Don't treat symptoms. Leave the appeals process as is.
2. Direct the Service to create the Advisory Boards required by Section 14(b) of NFMA. In addition to local Forest boards, Regional and a National Board should be created. These should be permanent two-way forums designed to reach out to a broad spectrum of citizens.
3. Direct the Forest Service to comply with NFMA Sections 6(*l*), financial evaluations and 8(c) timely annual report issuance.

4. Recommend that the Forest Service develop useful measures and tests for Plan success and failure and a means to evaluate and publicly explain results.

In this connection, the Committee of Scientists, might be reenlisted to review the agency proposals. The Advisory Boards also would be a useful place to then seek indepth evaluation of the proposals.

5. Make TSPIRS a more realistic financial presentation, buttressed with sensible displays of costs to do jobs. No "hard-dollar" proof has been provided to support the theory that timber harvests yields multiple-use benefits. The present system fails to quantify and qualify the multiple-use sustained yield (MUSY) units sought and those achieved. It does not show that losing money on a timber program is the most cost-effective, environmentally useful way to secure the nontimber values that are being sought.

6. Limit timber program loss levels on money-losing National Forests. Those losing over $50/MBF Cut show scant promise to be profitable. Loss control makes budget sense. Savings could be used to rejuvenate assistance to small private owners through State Foresters. It is notable that the 1990 proposed budget claims lifting Federal land log export restrictions would help reduce the deficit (which is doubtful). It continues subsidizing below-cost sales, and continues subsidies to help the timber industry sell wood products abroad, while eliminating all aid to small private owners.

7. To help reach more rationale decisions on Wilderness and whether "released" lands have a financially sensible timber production function, require the Forest Service to submit by proposed area and by site financial and resource data on the lands under consideration for Wilderness. A careful examination could well reveal that in Montana, for example, proposed wilderness additions involving tree covered lands are mainly sites where timber program costs will exceed receipts. A smaller National Forest timberland base of higher site land in timber production would make this program more cost effective.

8. Direct the Small Business Administration to avoid funding sloppy studies that propose to enlarge the Federal budget deficit.

PREPARED STATEMENT OF DON ALLEY, NORTHWEST MONTANA CHAPTER OF TROUT UNLIMITED, KALISPELL, MT

The Northwest Montana Chapter of Trout Unlimited has shown a deep interest in the relationships between the management of our national forests and the fisheries resources of Montana since its formation in 1980. Our chapter was involved in the forest planning process, and although we have chosen not to be a party to any appeals or lawsuits, our interest and involvement in national forest issues remains strong. We would like to take this opportunity to comment on the forest management issues on the Flathead and Kootenai National Forests.

Currently a great deal of attention is being focused on appeals and lawsuits, with some members of the community concerned primarily with the health and well-being of our natural environment, while others fear that management policies could result in the loss of many area jobs and disruption of our local economy. Trout Unlimited's primary concern is with the fisheries resource. However, we desire to be open minded and flexible, and wish no harm to the economic well-being of the community, and are aware of the hardships individuals will face should job losses occur. Trout Unlimited does feel that there is potential for reasonable harvest of timber while protecting the fisheries environment, and we are interested in seeking solutions that protect fisheries while still providing harvests of timber in area watersheds.

From a technical viewpoint, the major obstacle to such a solution is a lack of knowledge on the specific relationships between timber harvest and water quality. We need more information on water yield increases, changes in the timing of runoff that may occur after a major harvest, tolerance of specific streams to increases in sediment, amount of sediment reaching streams from harvest and road building activities, and better information on the effectiveness of improved management practices (Best Management Practices). Currently, Trout Unlimited is participating in a cooperative study of such issues sponsored by the Forest Service, Department of State Lands, and Plum Creek Timber under the direction of the Flathead Basin Commission. This study is a big step forward in responsible forest management. However, we are concerned that more time and additional funding may be needed for the study to compile all the needed information. In addition, as yet no similar efforts are underway in other Montana national forests. We would also point out that there are apparently restrictions on spending Forest Service dollars on research; dollars that are available for many other forest related endeavors. Additional funding for basic research on the effects of timber harvesting and road building on our wildlife resources are needed.

Legislative efforts that recognize and offer protection to our environment, such as the National Forest Management Act and the National Environmental Policy Act are welcomed by Trout Unlimited. However, swift and meaningful implementation of these laws requires manpower that has been in short supply. National forest personnel have made mistakes in planning forest activities, mistakes which often result in appeals. At the local level the National Forests lack the personnel to efficiently review such appeals. Often the appeals must be addressed by the same people who planned the appealed action, which may not only raise questions of bias, but pull staff members away from future planning efforts. One of the results of this is a further backlog of timber sale planning, keeping the national forest from meting planned harvest levels.

Trout Unlimited suggests that additional staff be hired by the national forests and that these additional staff people be given the responsibility of reviewing appeals, allowing the present staff to continue with scheduled planning efforts. In addition, Trout Unlimited supports the suggestion of Senator Baucus that the forests hire experienced mediators to attempt to resolve disputes at a local level. The issues we face on our national forests are complex; both in terms of the technical issues, and the social issues. Current national forest personnel are ill equipped to deal with both.

Although Trout Unlimited is not party to appeals or lawsuits on the Flathead Forest, and therefore has limited standing in the appeals and lawsuit issue, we will continue to keep abreast of developments that relate to the well-being of our fisheries resources. Trout Unlimited will review any resolution of the issues that may come, whether from negotiation or court action, and will resist any changes in planning, procedure, or policy that threatens our fisheries. However, we believe that with proper planning, staffing, and honest negotiation, solutions are possible that will provide at least reasonable relief to all interested parties, and we are willing to take part in any efforts to find such solutions.

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